Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HELEN EDWARDS,
CHRISTOPHER EDWARDS,
Petitioners,

v.

ACADIA REALTY TRUST, INC.,
WELLS FARGO GUARD SERVICE, INC.
OF FLORIDA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Regarding a claim under 42 U.S.C. § 1981 by a white husband and wife for retaliation for opposition to unlawful racial discrimination where a white security guard allegedly racially discriminated against groups of young black children in a place of public accommodation, must the plaintiffs prove that the racial discrimination complained of actually occurred, or is the plaintiffs' reasonable, good faith belief that unlawful racial discrimination occurred enough to protect the plaintiffs from retaliation for their opposition to the alleged discriminatory conduct?

2. Does a white person have standing under 42 U.S.C. § 1981 where the retaliation against the white person was not based upon the white person's own race, but upon the white person's opposition to racial discrimination against black people?

3. In a claim under 42 U.S.C. § 1983 for a violation of First Amendment free speech rights committed by a private corporation's employee acting under color of state law, must the plaintiff prove that the conduct that violated the plaintiff's rights was pursuant to a custom, policy, or practice of the defendant private corporation employer?

4. Are a husband and wife's constitutional rights to free speech and association violated where the husband and wife are both ejected from a place of public accommodation after the wife's peaceable vocalization of the couple's reasonable, good faith opposition to racial discrimination against a group of young, African-American children, and where the basis for the ejectment is the husband's and wife's association with the group of young African-American children?

5. Are a husband's constitutional rights to free speech and association violated where the husband is ejected from a place of public accommodation after the wife's peaceable vocalization of their reasonable, good faith opposition to racial discrimination against a group of young, African-American children, and where the basis for the husband's ejectment is the husband's association with his wife?

6. Regarding claims of violation of equal protection rights where white people suffer retaliation for opposing unlawful racial discrimination in a place of public accommodation, whether the class of similarly situated people is people in the place of public accommodation who witness the discrimination but do not outwardly oppose the discrimination?

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Opinions Below

The Report and Recommendation of the Magistrate Judge to the United States District Court for the Middle District of Florida recommending the granting in part of Respondents' Motions to Dismiss (A-37); the Order of the United States District Court for the Middle District of Florida granting in part Respondents' Motions to Dismiss (A-3); the District Court's Order granting Respondents' Motions for Summary Judgment and denying Petitioners' Motions for Summary Judgment (published as *Edwards v. Acadia Realty Trust, Inc.*, 141 F. Supp. 2d 1340 (M.D. Fla. 2001)) (A-21); the District Court's Order denying Petitioners' Motion to Alter or Amend the Order granting Defendants' Motions for Summary Judgment and denying Petitioners' Motions for Summary Judgment (A-63); the Order of the United States Court of Appeals for the Eleventh Circuit affirming the trial court (A-1); and, the Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioners' Motion for Rehearing (A-62); are included in the Appendix to this Petition.

Jurisdictional Statement

The order sought to be reviewed was entered on March 13, 2002 (A-62). The statutory provision believed to confer upon this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. 1254(1).

Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations Involved in the Case

The text of the following constitutional provisions and statutes are provided in the Appendix to this Petition: U.S. Const., amend. 1 (A-65); U.S. Const., Amnd. 14; 28 U.S.C. 1254(1) (A-65); 28 U.S.C. § 1331 (A-65); 28 U.S.C. § 1343 (A-66); 42 U.S.C. § 1981 (A-66); 42 U.S.C. § 1982 (A-67); and, 42 U.S.C. § 1983 (A-67).

Statement of the Case

This case was first filed in the United States District Court for the Middle District of Florida. The basis for federal jurisdiction in the District Court is under 28 U.S.C. § 1331 and 28 U.S.C. § 1343. The District Court granted Defendants/Respondents Acadia and Wells Fargo's Rule 12(b)(6) Motions to Dismiss Plaintiffs/Petitioners Helen and Christopher Edwards' claims for violation of their First Amendment rights of free association, violation of their Fourteenth Amendment rights of Equal Protection, conspiracy under 42 U.S.C. § 1985(3), and refusal or failure to prevent conspiracy under 42 U.S.C. § 1986. The Motions to Dismiss were denied as to the remaining counts under 42 U.S.C. § 1981 and under the First Amendment regarding the Edwardses' free speech rights.

On March 9, 2001, the District Court entered summary judgment against the Edwardses, denying the Edwardses' Rule 56 Motions for Partial Summary Judgment and granting Acadia's and Wells Fargo's Rule 56 cross Motions for Summary Judgment on the remaining claims under 42 U.S.C. § 1981 and under the First Amendment regarding the Edwardses' free speech rights. The Edwardses moved to alter or amend judgment, which motion was denied on April 17, 2001.

Thereafter, notice for an appeal to the United States Court of Appeals for the Eleventh Circuit was timely filed on May 14, 2001. The case was fully briefed and argued before a panel of three judges of the Eleventh Circuit. On January 4, 2002, that panel entered an order affirming all of the District Court's rulings. The Edwardses then timely filed a Petition for Rehearing En Banc, which was denied by an order dated March 13, 2002. This Petition is being timely filed within 90 days of the entry of that order.

Statement of Facts

At all times relevant, Petitioners Helen and Christopher Edwards are white people married to each other.[1] (R4-111-23; R4-112-122; R4-112-175,176; R3-57-2.) On November 20, 1998, the Edwardses went to Searstown Mall in their hometown of Titusville, Florida. (R3-57-3; R4-108-6.) The Edwardses were quietly sitting on a bench in the common area of the Mall in front of the Mall's movie theater. (R4-105-7:19-25; R1-2-1; R4-101-1; R4-101-1.) A local physician, Dr. Juan Perez, was sitting near the Edwardses. (R1-2-1.) The Edwardses and Dr. Perez, unacquainted with each other at the time, were each waiting for their respective children to emerge from the movie theater. (R4-105-7:19-25; R1-2-1; R4-101-2; R4-102-2.)

At all times relevant, Appellee Wells Fargo contracted with the owners of Searstown Mall to provide security guards for the Mall. (R4-103-53:3-55:19.) Andrew Bankowski was one of the Wells Fargo employees assigned to provide security at the Mall. (R4-105-6:1-6.) Part of his duties included providing security for the State of Florida

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[1]Mrs. Edwards also is of Cherokee ancestry, but that ancestry is irrelevant to this case. (R4-112-175,176.)

unemployment office located inside the Mall. (R4-105-39:24-40:12.)

While waiting, Dr. Perez and the Edwardses witnessed Wells Fargo security guard Bankowski brusquely accost and harass two different groups of African-American children, (R4-108-66:3-67:1; R4-111-44:20-46:20; R4-111-203:15-25), which culminated in the guard rudely marching a group of five well-behaved African-American girls (ranging in age from about five to about fourteen), out of the Mall and saying to them, "I've told you to get your black asses out of the mall." (R4-111-203:15-25.) The girls had been patronizing commercial establishments in the Mall and had made purchases in the Mall. (R4-108-46.)

The Edwardses witnessed that the security guard was not harassing groups of caucasian children in the Mall, even though those children exhibited the same or worse behavior than the African-American children, and even though the guards were present and observed the behavior of the white children. (R4-111-106:6-13, 192:2-12; R8-230-1-2; R8-231-1-2; R4-101-2; R4-102-2; R1-2-2.) The Edwardses were certain that the Mall security guards were unlawfully discriminating against the black children because of the Negro race of those children, which the Edwardses opposed and by which they were offended. (R8-230-2; R8-231-2; R4-101-2; R4-102-2; R4-101-2; R4-102-2.) As Bankowski was walking past Mrs. Edwards, Mrs. Edwards stated to Bankowski that he should stop discriminating against the black children. (R4-101-3; R4-102-3; R4-105-8:1-3.)

After Mrs. Edwards made her statement to Bankowski, he stalked up to Mrs. Edwards in a threatening manner and told her, "Shut your mouth" or "Shut up." (R1-2-2; R4-101-3; R4-102-3.) Bankowski then drew his long, heavy Maglight flashlight from a loop on his belt and brandished it near Mrs. Edwards in a way that Mr. and Mrs. Edwards perceived as threatening to Mrs. Edwards.

(R4-101-3; R4-102-3; R4-105-8:13-19, 11:1-9.) Mr. Edwards asked Bankowski if Bankowski was threatening Mrs. Edwards. (R4-105-11:7-9; R4-101-3; R4-102-3.) Bankowski responded in the negative, and Mr. Edwards quietly resumed his seat on the bench. (R4-101-3; R4-102-3.) Mr. Edwards said nothing else to Bankowski (or the other security guard) at any other time. (R4-105-9:19-22, 11:1-19; R4-101-3; R4-102-3.)

Bankowski was angered because Mrs. Edwards insinuated or said that he was racist. (R4-105-9:2-5, 16:4-12.) He told the Edwardses to leave the Mall, and he called the police to have them "trespassed" (officially banned) from the Mall because he felt that Mrs. Edwards would not listen to his explanation of why he was making the black girls leave the Mall. (R1-2-2; R4-101-3; R4-102-3; R4-105-8:19-9:2, 10:1-13.) Bankowski thought Mrs. Edwards was sincere in her opposition to what she perceived as racial discrimination. (R4-105-15:9-16:25.)

Dr. Perez observed that Bankowski acted belligerently and rudely, without cause or provocation, toward the black girls and toward Mr. and Mrs. Edwards. (R1-2-2.) At all times relevant, Mr. and Mrs. Edwards acted properly and peacefully. (R1-2-2; R4-101-3; R4-102-3.) It was apparent to anyone who observed Bankowski that he was acting in a hostile manner toward Mr. and Mrs. Edwards because of their opposition to and objections to the racial discrimination against the black girls by Bankowski. (R1-2-3; R4-101-3; R4-102-3.)

When the police officers arrived at Searstown Mall to "trespass" the Edwardses, both of the Edwardses explained to the officers that Bankowski wanted them trespassed because Mrs. Edwards had voiced opposition to racial discrimination against the young black girls. (R4-101-4; R4-102-4.) Both of the Edwardses objected to the police officers about Bankowski's discrimination against the black children and opposed the trespassing of themselves.

(R4-101-4; R4-102-4) Even though the group of young black girls was standing nearby, the police officers refused to speak to the young girls to confirm the Edwardses' story. (R4-101-4; R4-102-4.)

While the Edwardses' children and other people watched, the City of Titusville police officers "trespassed"; i.e., officially banned; the Edwardses from the Mall for two years. (R4-101-4; R4-102-4.) The policy and practice of the City of Titusville is to trespass *everyone* who a property owner or the owner's representative asks to be trespassed. (R4-101-7; R4-102-7.)

Wells Fargo management and Debra Hardy, the Mall manager, knew of the trespassing of the Edwardses within a few days of its occurrence. (R4-105-17:13-18:18, 36:1-15; R4-103-79:1-11.) At all times relevant, Ms. Hardy continuously was the manager of the Mall. (R4-103-31:14-32:6, 53:24-55:19.)

Hardy had the authority from the Mall owners to make all day-to-day, operational decisions for the Mall owners, including decisions about whether to request execution or recision of trespasses of Mall customers. (R4-103-64:22-65:16; R4-104-15:4-16:4, 20:11-21:9.) Acadia, through Hardy, delegated the authority and responsibility to Bankowski for rescinding the trespass order against the Edwardses. (R4-103-65:19-66:10, 81:17-25, 87:2-11.) Despite pleas from the Edwardses and others on behalf of the Edwardses beginning as early as November or December, 1998, Hardy and Bankowski failed to rescind the trespass order against the Edwardses. (R4-112-128:9-129:10; R4-103-8:2-10, 79:15-80:25, 86:21-87:5; R4-101-4; R4-102-4.) Hardy told Mr. Edwards that she did not want to hear the reasons why Mr. Edwards should not have been trespassed by a racist security guard and that she backed her security guards "one hundred per cent." (R4-109-179:16-180:6.) When the trespass order was not rescinded pursuant to the repeated requests to do so,

the Edwardses filed this lawsuit. (R4-103-11:3-10; R4-101-4; R4-102-4.) Within a week or so of the filing of this lawsuit, Acadia's successor owner of the Mall, Searstown Mall Association, Inc., (SMA) and the City of Titusville rescinded the trespass order. (R4-100-4, Ex. 6; R4-101-4; R4-102-4.) As a result of the trespassing, the Edwardses were injured and suffered substantial economic and emotional distress damages. (R3-57-7.)

Argument and Authorities

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S RULING CONFLICTS WITH OTHER CIRCUIT COURT'S HOLDINGS IN ANALOGOUS CONTEXTS THAT REASONABLE, GOOD-FAITH OPPOSITION TO RACIAL DISCRIMINATION IS PROTECTED FROM RETALIATION, EVEN IF SUCH BELIEF IS MISTAKEN.

This Court should grant certiorari to review this case because, as explained in more detail throughout this Petition, the Eleventh Circuit has entered a decision in conflict with the decision of other United States courts of appeals on the same important matters, has decided important questions of federal law that have not been, but should be, settled by this Court, and/or has decided important federal questions in ways that conflict with relevant decisions of this Court. Furthermore, the fragmentary and dated jurisprudence regarding retaliation against people who oppose discrimination in places of public accommodation is in desperate need of comprehensive guidance from this Court.

The facts of this case make it plain that a reasonable jury could find that Petitioners had a reasonable, good-faith belief that the activity they were witnessing was intentional racial discrimination

and that they were banished from the Mall for their opposition thereto. In all United States Courts of Appeal that have addressed the issue of retaliation for opposing unlawful discrimination in the employment context, it is black-letter law that reasonable, good-faith opposition to racial discrimination is protected from retaliation under Title VII and Section 1981, even if such belief were to be mistaken.[2] A typical holding reads: "Under Title VII, it is well established that an employee need not prove the underlying claim of discrimination in order to establish a retaliation claim. Instead, an employee's opposition to the discrimination is protected if she can reasonably form a good faith belief that the alleged discrimination existed." *Taylor v. Runyon*, 175 F.3d 861, 869 (11th Cir. 1999) (citation omitted); *accord Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261-62 (1st Cir. 1999); *Sumner v. United States Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990)); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1085 (3d Cir. 1996); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 357 n. 1 (4th Cir. 1985), *overruled on other grounds*, 490 U.S. 228 (1989); *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1004-07 (5th Cir. 1969); *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000); *Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 714 (8th Cir. 2000); *Trent v. Valley Electric Assn. Inc.*, 41 F.3d 524, 526 (9th Cir. 1994); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984); *compare Clark County School District v. Breeden*, 532 U.S. 268, 270 (2001) (refraining from ruling on the propriety of the Ninth Circuit's

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2Both Title VII and Section 1981 "have the same requirements of proof and use the same analytical framework...." *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998).

interpretation that opposition was protected under 42 U.S.C. § 2000e-3(a) "if she had a reasonable, good faith belief that the incident involving the sexually explicit remark constituted unlawful sexual harassment"). The employment standard of reasonable good faith should apply with as much or more force in a shopping mall that is a place of public accommodation where people have a right to be regardless of race or other protected status. Here, the Eleventh Circuit Court of Appeals has entered a decision in conflict with the decisions of other United States courts of appeals on the essentially identical important matter. The instant case presents the need and opportunity for this Honorable Court to clearly and unambiguously establish that extremely important matter in accordance with public policy and legislative intent.

Furthermore, insofar as this issue has not been decided in the context of a place of public accommodation, the Eleventh Circuit has decided this important question of federal law that has not been, but should be, settled by this Court. However, based on rulings of this Court that provide protection under § 1981 to a white woman who joined in a lunch-counter sit-in opposing racial discrimination against retaliatory banishment by the business and the police, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150-52 (1970), that provide damages and other relief under § 1982 to a white citizen prohibited from leasing his house and concomitant access to a community swimming pool to a black person, *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), that afford protection to white people under Section 1981, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976), that require labor unions to oppose racial discrimination against their members, *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), that grant standing to litigants who oppose racial discrimination in selection of jurors, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and that provide protection

against retaliation against former employees under Title VII, *Robinson v. Shell Oil Co.*, 519 U.S. 377 (1997), the Eleventh Circuit's ruling is contrary to the reasoning in those cases. Thus, the Eleventh Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Also, Respondents appear to argue that the "proof-of-intent" requirement under Section 1981 is lacking in this case. However, any "proof-of-intent" requirement under Section 1981 is satisfied if those who suffer retaliation base their opposition on a reasonable, good faith belief that intentional discrimination is occurring. Clarification of this point by this Court is another compelling reason for a grant of certiorari.

Furthermore, it should be pointed out that the errors of the lower courts in this case do not consist of erroneous factual findings or the misapplication of a properly stated rule of law. In the instant case, the standard incorrectly applied by the lower courts is that Petitioners and others who oppose discrimination must first prove that the discrimination is unlawful. In other words, the holding of the lower Courts in this case is that people who are mistaken in their reasonable, good-faith opposition to discrimination are not protected from retaliation. Such a standard is without precedent and is plainly contrary to legislative intent and public policy.

Moreover, even if the no-mistake standard were to apply, as a matter of law the evidence shows that a reasonable jury plainly could find that not only was Petitioners' opposition reasonable and in good-faith, the jury could find that Petitioners were not mistaken in their belief that unlawful racial discrimination was occurring. The Eleventh Circuit erred by ignoring the great weight of evidence in favor of Petitioners and by affirming the District Court's grant of summary judgment in favor of Respondents. Therefore, for all of the foregoing reasons, the matters at issue herein should be addressed by this Court.

II. BECAUSE THE ELEVENTH CIRCUIT'S RULING CONFLICTS WITH THE HOLDINGS OF THIS COURT AND OF OTHER CIRCUIT COURTS, THIS COURT SHOULD GRANT CERTIORARI TO OVERTURN THE LAW OF THE ELEVENTH CIRCUIT THAT A WHITE PERSON DOES NOT HAVE STANDING UNDER 42 U.S.C. § 1981 FOR A CLAIM OF RETALIATION FOR OPPOSING RACIAL DISCRIMINATION AGAINST BLACK PEOPLE WHERE THE RETALIATION IS NOT BASED UPON THE WHITE PERSON'S OWN RACE.

Because the Eleventh Circuit did not provide a detailed basis for its ruling in this case, it may have been relying on its own precedent of *Little v. United Technologies*, 103 F.3d 956 (11th Cir. 1997), which held that the white plaintiff had no claim under § 1981 because the retaliation against him was not based upon his own race, but upon his opposition to racially derogatory remarks against black coworkers. *See id.* at 961. However, the ruling in *Little* is completely contrary to the long-established holdings of this Court and of other Circuits that have addressed this issue. *See, e.g., Sullivan v. Little Hunting Park*, 396 U.S. 229, 237 (1969) (holding that a white person who has been "punished for trying to vindicate the rights of non-white minorities" has standing to sue under 42 U.S.C. § 1982); *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 14 (1st Cir. 1979) (holding that housing developer and every other person has an implied right of action under § 1981 against any other person who, with a racially discriminatory intent, interferes with his right to make contracts with non-whites); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 312 (2d Cir. 1975) (holding that a white man who suffered retaliation for selling his house to a black man had a cause of action under § 1981), *modified on other grounds*, 520 F.2d 409; *Liotta v. National Forge Co.*, 629 F.2d 903,

906-07 (3d Cir. 1980) (holding that summary judgment is inappropriate where material issues of fact remain regarding § 1981 claim brought by plaintiff allegedly discharged because he espoused the rights of company's black employees); *Fiedler v. Marumsco Christian Schl.*, 631 F.2d 1144, 1150 (4th Cir. 1980) (holding that white people had a cause of action under § 1981 for expulsion based on association with a black person); *Alizadeh v. Safeway Stores, Inc.*, 802 F.2d 111, 114 (5th Cir. 1986) (holding that a white plaintiff maintained a § 1981 claim alleging discrimination because of marriage to a non-white person); *Winston v. Lear-Seigler, Inc.*, 558 F.2d 1266, 1268 (6th Cir. 1977) (reversing summary judgment against a white man who was fired for opposing racial discrimination against a black coworker); *Maynard v. City of San Jose*, 37 F.3d 1396, 1403 (9th Cir. 1994) (holding that a white person who assisted a black person had standing under § 1981); *Patrick v. Miller*, 953 F.2d 1240, 1249-50 (10th Cir. 1992) (holding that a white employee who suffered retaliation for helping a black employee file an anti-discrimination claim had standing under § 1981). Thus, This Court should grant certiorari to overturn the Eleventh Circuit's legally erroneous and socially destructive holding of *Little*.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S RULING CONFLICTS WITH THE RULINGS OF THIS COURT REGARDING WHETHER PRIVATE ENTITY STATE ACTORS SHARE THE SAME IMMUNITIES AS MUNICIPALITIES.

The Eleventh Circuit plainly erred as a matter of law by affirming summary judgment against Petitioners based on a purported lack of evidence of a custom or policy as required by Section 1983. First, no proof of custom or policy should be required to

show vicarious liability of a private entity in the role of state actor. Second, even if such evidence of policy or custom is required, Petitioners have adduced such evidence on the record.

A. No custom or policy need be established to hold liable a private entity in the role of state actor under 42 U.S.C. § 1983.

For the Eleventh Circuit to require a custom or policy to establish the liability of a private entity in the role of state actor decides an important question of federal law that has not been, but should be, settled by this Court. Moreover, the Eleventh Circuit's decision decides an important federal question in a way that conflicts with relevant decisions of this Court. The District Courts in *Taylor v. Plousis*, 101 F. Supp. 2d 255, 264 N. 4 (D. N.J. 2000), and in *Groom v. Safeway Inc.*, 991 F. Supp. 987, 991 n. 3 (W.D. Wa. 1997), have recognized this issue, and the District Court in the instant case deferred consideration of the issue to the Eleventh Circuit. *See Edwards v. Acadia Realty Trust, Inc.*, 141 F. Supp. 2d 1340, 131347 n. 7 (M.D. Fla. 2001).

The current Eleventh Circuit rule is that private entities acting under color of state law are not subject to vicarious liability. *See, e.g., Buckner v. Toro*, 116 F.3d 450 (11th Cir. 1997); *Harvey v. Harvey*, 949 F.2d 1127, 1129-30 (11th Cir. 1992). With all due respect, the rule from *Harvey* and similar cases is an unwarranted and unsupported extension, without thorough analysis, of the policy and custom requirements for municipal liability stated in *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978). In addition, this Court's holding in *Richardson v. McKnight*, 521 U.S. 399 (1997), conflicts with the Eleventh Circuit's decision here because the *Richardson* holding restricts the right of private corporations to share the immunities of municipal corporations.

In *Buckner*, the Eleventh Circuit merely stated that when the private employer "performs a function traditionally within the exclusive prerogative of the state, . . . it becomes the functional equivalent of the municipality." 116 F.3d at 452. Here, the Edwardses do not dispute that some functional equivalency in the provision of the service itself is present, but the important differences between public and private corporations; e.g., profit motive, civil service, competition, and accountability; still remain. *See Richardson*, 521 U.S. at 399. Regarding the instant case, it should be noted that Respondents, two private corporations, act as state actors in only two ways: through contract as landlord and security providers for the government office located in the shopping mall and through enlisting -- even usurping --the police power of the City of Titusville in trespassing the Edwardses. "We may presume, absent a showing to the contrary, that the municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985) (footnote omitted). Here, the voluntary roles played for profit by Respondents as state actors without direct supervision by any governmental entity provide little or no reason to afford Respondents a shield from respondeat superior liability, while the traditional rationales for vicarious liability do apply. *See Monell*, 436 U.S. at 693-94, n.58.

Buckner also states that *Monell* requires that direct liability is "an element of the § 1983 claim." 116 F.3d at 452. However, such analysis ignores the strong distinction between municipal and private corporations made by the United States Supreme Court in *Monell* and *Richardson* that was based on factors other than the limited functional equivalency of the service itself. The *Buckner* Court went on to "reject the notion that the policy or custom requirement imposed by *Monell* may be equated with

qualified immunity." 116 F.3d at 453. However, the *Howell* holding upon which *Buckner* is based appears to base its holding on the same overruled qualified immunity case upon which *Harvey* relies. *See Howell v. Evans*, 922 F.2d 712, 724 (11th Cir. 1991) (citing *Jones v. Preuit & Mauldin*, 851 F.2d 1321 (11th Cir. 1988)). Nevertheless, the qualified immunity doctrine as expressed in *Richardson* is a powerful analogy. *See Taylor*, 101 F. Supp. 2d at 264 n.4; *Groom*, 991 F. Supp. at 991 n.3. Thus, despite the *Buckner* and *Harvey* opinions, a thorough analysis of the history and intent of respondeat superior liability and civil rights laws in general, and of Section 1983 in particular, impel a finding that private corporations are not entitled to the special protection afforded to municipal corporations.

Also, the arguments noted by this Court in *Richardson*, and by the courts in *Taylor* and *Groom* apply with even more force to the instant case in light of Respondents' state action of essentially usurping governmental functions in dictating the actions of the police regarding the trespass order; i.e., that the police had no choice but to do the bidding of the Mall owner in trespassing the Edwardses. "Trespassing," like other self-help actions such as replevin, is essentially a state action by private entities who are denied qualified immunity. *See Wyatt v. Cole*, 504 U.S. 158, 168-69 (1992) (stating that private defendants "faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute" are not entitled to immunity). Thus, even if Respondents are state actors, respondeat superior liability should apply.

Finally, the history and policy considerations that underlie Section 1983, especially the federalism concerns that shield state government entities from respondeat superior liability, either do not apply to private employers or counsel against shielding private employer state actors from vicarious liability. Again, the Eleventh Circuit's error does not consist of

erroneous factual findings or the misapplication of a properly stated rule of law; instead, the Eleventh Circuit has decided an ubiquitously important question of federal law that has not been, but should be, settled by this Court. The Eleventh Circuit has also decided an important federal question in a way that conflicts with relevant decisions of this Court. Therefore, compelling reasons warrant certiorari review of this case by this Court.

B. Petitioners have adduced sufficient evidence to establish Respondents' custom or policy.

Certiorari should be granted on this issue because the Eleventh Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter of establishing policy and custom. Additionally, even if the Eleventh Circuit's error consists of erroneous factual findings or the misapplication of a properly stated rule of law, the error should be rectified because it is intertwined with the Eleventh Circuit's other decisions on the § 1983 claims that are erroneous under United States Supreme Court Rule 10(a) and 10(c).

As a preliminary step to determining that evidence of a custom or policy exists, it may be useful to describe the basis for establishing that Respondents Acadia and Wells Fargo are state actors.[3] Respondents are state actors under two tests: the public function test and the nexus/joint action test. Respondents are state actors under the

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3Whether or not Acadia and Wells Fargo were state actors is relevant only to the First Amendment count under section 1983 because claims under 42 U.S.C. § 1981 do not require state action.

public function test because they are acting as gatekeeper and guard to a State of Florida unemployment benefits office. The First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, including on action by the owner of private property partially used for public purposes. See *Lloyd Corporation, Ltd., v. Tanner*, 407 U.S. 551, 567 (1972) (holding that a shopping center owner is not a state actor when the shopping center is used for private purposes only). Here, because the public State of Florida unemployment office is located at the Mall, the Mall is a public forum, subject only to reasonable time, place, and manner restrictions. Here, Respondents trespassed the Edwardses from the vicinity of a government office based on the content of the Edwardses' speech and association; i.e., Respondents impermissibly trespassed the Edwardses because the Edwardses expressed their opposition to racial discrimination, insinuated that Bankowski was a racist, and refused to listen to his "explanation." Therefore, Wells Fargo and Acadia are state actors under the public function test.

Acadia and Wells Fargo also are state actors under the nexus/joint action test because the City of Titusville government so far insinuated itself into a position of interdependence with Respondents that the City was a joint participant in the enterprise. *See American Manufacturers Mutual Insurance Company v. Sullivan*, 526 U.S. 40 (1999); *Perkins v. Londonderry Basketball Club*, 196 F.3d 13 (1st Cir. 1999); *Disabled in Action of Metropolitan New York v. Hammonds*, 202 F.3d 110 (2d Cir. 2000); *Goldstein v. Chestnut Ridge Vol Fire Co.*, 218 F.3d 337 (4th Cir. 2000); *Lansing v. City of Memphis*, 202 F.3d 821 (6th Cir. 2000); *Messman v Helmke*, 133 F.3d 1042 (7th Cir. 1998); *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227 (9th Cir. 1996). For instance, the evidence shows contacts among and between Acadia, Wells Fargo, and the City of Titusville that could prove the

actors reached an understanding to violate Petitioners' rights. *See Dennis v. Sparks*, 449 U.S. 24, 27 (1980) (holding that willful participation in joint action with the State or its agents constitutes state action).

Also, Petitioners show that an agreement existed regarding Wells Fargo and the police and that Wells Fargo had a major part in the original "trespassing" of Petitioners. The police officers were activated by a municipal policy and custom to automatically implement and enforce the demands of property owners and the agents of property owners to eject and banish people from those owners' property. Thus, the evidence shows that Wells Fargo and Acadia were acting under color of state law also because they are jointly engaged with City of Titusville police officers in the actions against the Edwardses.

Under either or both theories of state action, Acadia and Wells Fargo had a policy, custom, and practice resulting in the violation of Petitioners' rights: Hardy and Bankowski were delegated the authority to set and implement trespassing policy by Acadia; Acadia delegated all responsibility for Mall management, including the trespassing of customers, to Hardy; and, Acadia's policies are delegated to Bankowski, as shown by the "one hundred per cent" backing and ratification by Hardy of Bankowski's trespassing and all other activities, even though the Edwardses attempted to notify Hardy that the trespassing was due to their speaking out regarding unlawful racial discrimination. In fact, the only arguably non-racism "policy" of Wells Fargo is its mild admonitions for its employees not to discriminate against each other. Besides, a single or initial incident can provide evidence of a custom or policy, particularly if the Appellee is negligent about training and/or supervising to prevent the violation of rights. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 380 (1989). Here, the evidence is unrefuted that neither

Hardy nor Bankowski received training regarding opposition to unlawful discrimination or other practices, even in time to rescind the Edwardses' banishment before the lawsuit was filed; and, no training was given regarding direct racial discrimination against mall customers. Therefore, for all of the foregoing reasons, custom and policy evidence exists, even if it were necessary to establish liability for a private corporation in the role of state actor; and, the Eleventh Circuit's affirmation conflicts with relevant case law from this Court and from other Courts of Appeal.

IV. CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S DISMISSAL OF PETITIONERS' FREE ASSOCIATION CLAIMS UNDER THE FIRST AMENDMENT AND 42 U.S.C. § 1983 CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT; OR, ALTERNATIVELY, THE ELEVENTH CIRCUIT HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW REGARDING FIRST AMENDMENT RIGHTS OF FREE ASSOCIATION THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Eleventh Circuit has decided important federal questions regarding First Amendment rights of intimate and expressive association in a way that conflicts with relevant decisions of this Court; or, alternatively, the Eleventh Circuit has decided important questions of federal law regarding First Amendment rights of free association that have not been, but should be, settled by this Court. The Edwardses adequately allege a violation of their rights of free association because, inter alia, the relatively quiet Mr. Edwards could be found to have been banished from the Mall solely because of his intimate association with his wife, who voiced her opposition

to discrimination; and, Respondents associated Mr. Edwards with his wife. Also, the Respondents associated Mrs. Edwards with her husband, who was trespassed because he stood up to Bankowski and the police regarding the retaliation against himself and Mrs. Edwards. Hence, the Edwardses allege that Respondents subjected each of the Edwardses to punishment, pains, penalties, and exactions; e.g., ejection, banishment, and the concomitant injuries suffered by the Edwardses; unlike those to which white persons were subjected by Respondents because of Respondents' violative actions taken against each of the Edwardses, as each of the Edwardses was accompanied by and associated with the other. (R3-57-6, Par. 23.) In so stating, the Third Amended Complaint alleges that the Edwardses' association with each other is a constitutionally protected intimate relationship. The right of intimate association encompasses the personal relationships that attend the creation and sustenance of a family, including marriage. *See Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984).

Also, the Edwardses adequately alleged that they were associating with the black children for the purpose of expressing their First Amendment rights.

Expressive association concerns the freedom to associate for the purpose of engaging in activities protected by the First Amendment. *See id.* at 617-18. Mrs. Edwards can obtain protection for an asserted associational right if she can demonstrate either that the asserted association closely enough resembles a family relationship to be protected by the right to intimate association, or that the purpose of the association is to engage in activities independently protected by the First Amendment. *See id.* The Edwardses were trespassed because of their anti-discrimination association with the black children when the black children communicated with the Edwardses and the Edwardses took the side of the black children. It was not necessary for the

Edwardses to have spoken with the black children or that the black children became aware of the Edwardses' actions. It is enough, as contained in the Third Amended Complaint, that the Edwardses spoke out on behalf of the black children and that the Edwardses' opposition to discrimination, in the minds of the security guards, the Mall manager, and by Respondents, associated the Edwardses with people of color. (R3-57-4, Par. 16.) Similarly, the Third Amended Complaint alleges that Respondents subjected each of the Edwardses to punishment, pains, penalties, and exactions; e.g., ejection, banishment and the concomitant injuries suffered by the Edwardses; unlike those to which white persons were subjected by Respondents because of Respondents' violative actions taken against each of the Edwardses, as each of the Edwardses was associated with people of color. (R3-57-6, Par. 23.) The Edwardses also allege that at all times relevant, Respondents acted toward the Edwardses because of the Respondents' association of the Edwardses with people of color. (R3-57-9, Par. 41.) Thus, the Edwardses clearly allege that they were associating with the black children for the purpose of expressing the Edwardses' First Amendment rights. Thus, the Edwardses adequately allege a violation of their rights of expressive association with the black children.

Additionally, a single association may coincide and possess both intimate and expressive features and, therefore, fall within the scope of not only the right of intimate association but also the right to expressive association." *Id.* at 618. Clearly, under the liberal standards of notice pleading, the Edwardses have alleged claims of violations of their rights of both intimate and expressive association. Therefore, because the Eleventh Circuit has decided important federal questions regarding First Amendment rights of intimate and expressive association in a way that conflicts with relevant decisions of this Court; or, alternatively, because the Eleventh Circuit has

decided important questions of federal law regarding First Amendment rights of free association that have not been, but should be, settled by this Court, this Court should grant review of this case.

V. CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT IN DISMISSING PETITIONERS' EQUAL PROTECTION CLAIMS.

In affirming the dismissal of the Equal Protection claims, the Eleventh Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. Here, the District Court states, "Plaintiffs have not alleged that others who were similarly situated were treated differently than Plaintiffs." However, the Edwardses allege that Respondents' conduct deprived them of the rights, privileges, or immunities secured by the Constitution or laws of the United States through the Fourteenth Amendment and that are enjoyed by white people -- particularly by white people who do not oppose unlawful racial discrimination. (R3-57-11.) Also, the Edwardses allege that Respondents subjected each of them to punishment, pains, penalties, and exactions; e.g., ejection, banishment and the concomitant injuries suffered by Petitioners; unlike those to which white persons -- particularly white persons who do not oppose unlawful racial discrimination -- were subjected by Respondents because of Respondents' violative actions taken against each of the Edwardses, as each of the Edwardses was accompanied by and associated with the other; and, as each of the Edwardses associated with people of color. (R3-57-13.) Here, the proper comparator to the Edwardses for Equal Protection purposes are people such as Dr. Perez; as alleged in the Third Amended Complaint, a white patron of the

Mall who witnessed the discrimination but did not oppose the discrimination in a way apparent to the discriminator. Dr. Perez, of course, was not subjected to the humiliating and costly banishment from the Mall.

Also, the Edwardses allege racially discriminatory animus when they state that they are denied by all Respondents the full and equal enjoyment of the benefits of the Mall because of their opposition to the discrimination or segregation of the black children on the basis of the race and/or color of the black children, and because of Respondents' animus thereto. (R3-57-11.) Thus, the Edwardses adequately allege their Equal Protection claim and certiorari should be granted to address this issue.

Conclusion

Because of the high value placed on people who legitimately oppose unlawful discrimination, because of the ubiquity and sacredness of free speech and of spousal association, because of the far-reaching injustice and inequity of allowing private employers to evade accountability behind the municipal standard of custom or policy, and because of the drastic and unwanted consequences to those and other relationships that are likely to occur if the Eleventh Circuit Court of Appeals' affirmance of the District Court's decisions that conflict with decisions of this Court and of other Courts of Appeal and/or that decide important questions of law that should be decided by this Court are to stand, this Honorable Court should grant Petitioners Petition for Writ of Certiorari.

Respectfully submitted,

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June 10, 2002

FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

HELEN EDWARDS,
CHRISTOPHER EDWARDS,
Petitioners

v.

ACADIA REALTY TRUST, INC.,
WELLS FARGO GUARD SERVICE, INC.
OF FLORIDA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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70 pgs

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 01-12909

D.C. Docket No. 99-00110-CV-ORL-6-28

HELEN EDWARDS,
CHRISTOPHER EDWARDS,

Plaintiffs-Appellants,

versus

ACADIA REALTY TRUST, INC.,
WELLS FARGO GUARD SERVICE, INC., OF FLORIDA,

Defendants-Appellees,

CITY OF TITUSVILLE, Florida,
SEARSTOWN MALL ASSOCIATION, INC.,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida

(January 4, 2002)

Before WILSON, HILL and FAY, Circuit Judges.

PER CURIAM:

Helen Edwards and Christopher Edwards brought this action against Acadia Realty Trust, Inc., and Wells Fargo Guard Services, Inc., of Florida alleging violations of 42 U.S.C. §§ 1981, 1983, 1985 and 1986. After a hearing, the district court granted summary judgment to defendants on all claims. The Edwards filed this appeal.

We have considered the arguments of counsel, presented both in their briefs and at oral argument. We have also carefully reviewed the record, including the orders of the district court. Finding no reversible error therein, the judgment of the district court is **AFFIRMED.**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HELEN EDWARDS, et al.,
Plaintiffs,

-vs- Case No. 6:99-cv-110-Orl-28KRS

ACADIA REALTY TRUST, INC., et al.,
Defendants.
_____/

ORDER

Plaintiffs brought this action against Acadia Realty Trust, Inc. ("Acadia"), City of Titusville ("Titusville"), SearsTown Mall Association, Inc. ("STMA"), and Wells Fargo Guard Service, Inc. of Florida ("Wells Fargo") alleging that their rights were violated because of their opposition to Defendants' racial discrimination against others. Plaintiffs contend that they were improperly "trespassed" from the SearsTown Mall in Titusville after they complained about Defendants' treatment of black children at the mall.

This cause is currently before the Court on Acadia's Motion to Dismiss Plaintiffs' Third Amended Complaint (Doc. 58) and Wells Fargo's Motion to Dismiss Plaintiffs' Third Amended Complaint (Doc. 63). STMA and Titusville also filed Motions to Dismiss (Docs. 59 and 61); however, Plaintiffs' claims against those Defendants have been settled and those motions, as well as others relating to those Defendants, will be denied as moot.

Since the issuance of a Report and Recommendation on the foregoing motions, Plaintiffs have filed a Motion To Amend (Doc. 167)

with an attached proposed Verified Fourth Amended Complaint, and a Motion to Supplement or Amend Complaint (Doc. 177) with an attached proposed Verified Fifth Amended Complaint. This Order addresses those Motions as well.

1. Motions to Dismiss (Docs. 58 and 63)

The United States Magistrate Judge has submitted a Report and Recommendation (Doc. 94) recommending that the Defendants' Motions (Docs. 58 and 63) be granted in part and denied in part.[1] All parties have filed Objections to the Report and Recommendation,[2] and all parties have filed Responses to the respective Objections.[3]

After an independent review of the applicable law and the record in this matter, including the

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1Specifically, and as discussed in more detail in the text of this Order, the Report recommends that Count I of the Third Amended Complaint be dismissed as to Defendant Titusville only; that Count II of the Third Amended Complaint be dismissed in its entirety as to Defendant STMA; that Count II of the Third Amended Complaint be dismissed as to Defendants Acadia, Titusville, and Wells Fargo on Plaintiffs' claims of freedom of association and right to petition; that Count III of the Third Amended Complaint be dismissed as to all four Defendants; that Counts IV and V be dismissed as to all four Defendants; that Plaintiffs' claims seeking injunctive relief be dismissed; and that the Motions to Dismiss be denied in all other respects. As noted in the text, the issues relating to Defendants STMA and Titusville are now moot.

2(Docs. 130, 132, and 134).

3(Docs. 145, 149, and 150).

Objections and Responses filed by the parties, the Court agrees almost entirely with the conclusions in the Report and Recommendation, as more specifically set forth below.[4] Accordingly, Defendants' Motions will be granted in part and denied in part.

A. Pleading Requirements

The Report correctly notes that in reviewing a motion to dismiss, this Court must view the complaint in the light most favorable to the Plaintiff and that a complaint should not be dismissed "unless it appears beyond doubt that Plaintiff can prove no set of facts that would entitle him to relief." (Doc. 94, at 5) (citing Scheuer v. Rhodes, 416 U.S. 232 (1974), and Conley v. Gibson, 355 U.S. 41(1957)). However, the Report also states that "in the context of civil rights, there is a heightened pleading requirement and the plaintiff must 'allege with some specificity the facts which make out its claim.'" (Doc. 94, at 5) (quoting GJR Invs., Inc. v. County of Escambia, Florida, 132 F.3d 1359, 1367 (11th Cir. 1998)).

In their Objections (Doc. 134), Plaintiffs contest the Report's statement regarding a heightened pleading requirement. They argue that the holding of GJR has been abrogated and that there is no heightened pleading requirement in civil rights cases. Plaintiffs further argue that even if GJR remains good law, its "heightened pleading requirement" relates only to qualified immunity of government officials, which is not at issue here. The Defendants do not respond to this argument

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4In the interest of consistency, this Order to the extent possible follows the format and order of discussion used in the Report and Recommendation.

regarding the validity and/or applicability of GJR; only Wells Fargo mentions this contention (Doc. 150), asserting that regardless of whether a heightened pleading standard or a "regular" pleading standard applies, Plaintiffs have failed to allege sufficient facts in support of their civil rights claims.

In GJR, the plaintiff filed suit against the county and four individual defendants under 42 U.S.C. § 1983 for alleged constitutional violations. The defendants moved to dismiss based on qualified immunity. In discussing the qualified immunity defense, the Eleventh Circuit discussed a "heightened pleading requirement":

> [W]hile Fed. R. Civ. P. 8 allows a plaintiff considerable leeway in framing its complaint, this circuit, along with others, has tightened the application of Rule 8 with respect to § 1983 cases in an effort to weed out nonmeritorious claims, requiring that a § 1983 plaintiff **allege with some specificity the facts which make out its claim**. Some factual detail in the pleadings is necessary to the adjudication of § 1983 claims. This is particularly true in cases involving qualified immunity, where we must determine whether a defendant's actions violated a clearly established right. Accordingly, when reviewing a district court's disposition of a motion to dismiss a § 1983 claim on qualified immunity grounds, we are guided by the regular 12(b)(6) standard and by the heightened pleading requirement.

132 F.3d at 1367 (citations omitted) (emphasis added). The bolded portion above is quoted in the Report and Recommendation in support of the proposition that there is a heightened pleading requirement in civil rights cases.

In the instant case, there are no claims against individual defendants and no defense of qualified immunity. Hence, Plaintiffs appear correct that GJR is distinguishable. In any event, the United States Supreme Court has held that there is **not** a heightened pleading requirement in section 1983 actions. See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993));[5] see also Rey v. Kmart Corp., 1998

5In Leatherman, the Court stated:

> We think that it is impossible to square the "heightened pleading standard" applied by the Fifth Circuit in this case with the liberal system of "notice pleading" set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief." In Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), we said in effect that the Rule meant what it said:
>
> > "[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."
>
> Id., at 47, 78 S.Ct., at 103 (footnote omitted).
>
> Rule 9(b) does impose a particularity requirement in two specific instances. It provides that "[i]n all

averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Thus, the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. Expressio unius est exclusio alterius.

The phenomenon of litigation against municipal corporations based on claimed constitutional violations by their employees dates from our decision in Monell, supra, where we for the first time construed § 1983 to allow such municipal liability. Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.

507 U.S. at 168-69.

WL 656070, *2 (S.D. Fla. July 21, 1998) ("[T]he Court will not apply a standard of heightened specificity, more stringent than the usual pleading requirements of the civil rules, in cases alleging liability under § 1983.") (citing Leatherman). Therefore, Plaintiffs need not satisfy a "heightened" pleading requirement, and no such requirement has been imposed in ruling on Defendants' Motions to Dismiss in this Order. To the extent the Report and Recommendation states otherwise, the Report will not be adopted as the Order of this Court. However, the Court agrees with the rest of the Report's conclusions even under the "regular" standard of pleading.

B. Standing

The Report concludes that Plaintiffs have standing to raise the civil rights claims that they allege even though they are not members of a minority. After considering the arguments raised in the objections filed by Wells Fargo and Acadia (Docs. 130 and 132), the Court agrees with the conclusion in the Report that Plaintiffs have sufficiently alleged that they have standing to bring the instant claims.

C. Counts II and III -- Claims Under 42 U.S.C. § 1983

In Count II of the Third Amended Complaint, Plaintiffs allege a claim under 42 U.S.C. § 1983 for violation of their rights of free speech, petition, and association under the First and Fourteenth Amendments. The Magistrate's Report recommends, as against Defendants Acadia and Wells Fargo, dismissal of Count II as it relates to

freedom of association and right to petition but not as it relates to the claimed violation of free speech rights. Count III of the Third Amended Complaint alleges violation of 42 U.S.C. §1983--race-based denial of public accommodation under the Equal Protection Clause of the Fourteenth Amendment. The Report recommends dismissal of this Count in its entirety.

As noted in the Report and Recommendation, "[a] successful section 1983 action requires a showing that the conduct complained of (1) was committed by a person acting under color of state law and (2) deprived the complainant of rights, privileges, or immunities secured by the Constitution or laws of the United States." Harvey v. Harvey, 949 F.2d 1127, 1130 (11th Cir. 1992) (citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156-57 (1978)). Each of these elements will be addressed in turn, along with the appurtenant issues addressed in the Report.

1. State Action

The Report concludes that Plaintiffs have sufficiently alleged state action as to Defendants Wells Fargo and Acadia because Plaintiffs have "alleged that there was a policy or custom to automatically implement and enforce the demands of property owners even if those requests were discriminatory." (Doc. 94, at 10). Accordingly, the Report recommends that Counts II and III not be dismissed against Wells Fargo or Acadia on the basis of lack of state action.

The Court agrees with the Report that under Smith v. Brookshire Brothers, Inc., 519 F.2d 93 (5th Cir. 1975),[6] Plaintiffs have sufficiently alleged

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6In Bonner v. City of Prichard, 661 F.2d 1206(11th Cir. 1981) (en banc), the Eleventh

that Wells Fargo and Acadia acted in concert with the police pursuant to a custom or plan so as to render Wells Fargo and Acadia state actors, at least for the purposes of the Motions to Dismiss. Hence, the motions to dismiss on this basis will be denied.

2. Respondeat Superior (Acadia)

The Report notes that despite the general rule that a corporation cannot be strictly liable on section 1983 claims based on respondeat superior, a corporation may be held liable for the unconstitutional acts of employees where there is a "policy, custom, or action by those who represent official policy" which causes the injury. The Report then recommends that Acadia's motion to dismiss on respondeat superior grounds be denied because "Plaintiffs have alleged a custom or policy of violating rights and evading duties to follow nondiscriminatory policies." (Doc. 94, at 11). Upon consideration, the Court agrees that Plaintiffs have sufficiently alleged an official policy for the purposes of the motions to dismiss.

3. Intention to Violate Rights of Free Speech. Petition. and Association

a. Free Speech

The Report concludes that Plaintiffs have sufficiently alleged a violation of their free speech rights against Acadia and Wells Fargo to survive the motions to dismiss. Distinguishing Lloyd Corp. v. Tanner, 407 U.S. 551(1972), the Report concludes that "it does not appear that Plaintiffs' speech

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Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit handed down through September 30, 1981.

would have been effective had they been in any location other than within the mall where the discrimination occurred." (Doc. 94, at 14). The Report further concludes that "[e]ven if the mall were found to be a nonpublic forum, the restrictions would need to be 'content-neutral and reasonable' to pass constitutional muster." (Doc. 94, at 14). The Report concludes that Plaintiffs have alleged that the restrictions are not content-neutral inasmuch as the "trespass" was allegedly based on the content of their speech. The Court agrees with the Report's conclusions, and Plaintiffs free speech claims are sufficiently alleged to survive the motions to dismiss.

b. Freedom of Association

As noted above, the Report recommends dismissal of the freedom of association claims against all Defendants. The Report notes that there are two forms of constitutionally protected association -- "intimate association" and "expressive association." See. e.g.. Cummings v. DeKalb County, 24 F.3d 1349 (11th Cir. 1994). The Report concludes that Plaintiffs have failed to allege either of these types of association and that therefore their claims should be dismissed. As to "expressive association," the Report states, "Plaintiffs have not alleged that they were associating with the minorities at all, and not for the purpose of expressing their First Amendment rights." (Doc. 94, at 15).

Despite Plaintiffs' objections to the Report's recommendation, the Court agrees that Plaintiffs have failed to allege either expressive or intimate association with the black children. Accordingly, Plaintiffs' freedom of association claims will be dismissed.

c. Freedom of Petition

In their objections (Doc.- 134), Plaintiffs concede that their right-to-petition claim should be dismissed. Accordingly, this portion of Count II will be dismissed.

4. Violation of Equal Protection

The Report concludes that Plaintiffs' equal protection claims (Count III) should be dismissed because Plaintiffs have not alleged that "they were treated differently than any other person who was trespassed or than any other person who arguably interfered with the guards' performance of their duties." (Doc. 94, at 16). The Court agrees with this conclusion, and accordingly Count III will be dismissed.

D. Count I-- Race-Based Denial of Public Accommodation Under 42 U.S.C. § 1981

In Count I of their Third Amended Complaint (Doc. 57), Plaintiffs allege a claim under 42 U.S.C. § 1981 for race-based denial of a public accommodation. Plaintiffs contend that they were denied the right to full and equal benefit of laws when they were prohibited from entering the mall for two years.[7] In the Report (Doc. 94), the United States Magistrate Judge recommends that this Count not be dismissed against Acadia or Wells Fargo.

1. Enumerated Rights

As noted in the Report, 42 U.S.C. § 1981 provides:

7Plaintiffs acknowledge that this prohibition was rescinded after a few months (Doc. 77).

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
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> ***
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> ***
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law.

The Report concludes that Plaintiffs have sufficiently alleged a cause of action against Wells Fargo under this provision because they have alleged that their "trespass" from the mall "affected their ability to contract with merchants in the mall" and "that they were punished in a discriminatory manner and were not treated equally with those who did not defend minorities." (Doc. 94, at 17-18). The Court agrees with the Report's conclusion, and Wells Fargo's motion to dismiss will not be granted on this basis.

2. Racial Animus

The Report concludes that Plaintiffs have "clearly alleged in their complaint that the actions of the Defendants were motivated by racial animus

in that they were 'trespassed' for defending the rights of minorities." (Doc. 94, at 18). The Report thus concludes that Wells Fargo's motion to dismiss on this ground should be denied. The Court agrees with this recommendation.

3. Claims Against State Actors May Only Be Brought Under 42 U.S.C. § 1983

The Magistrate Judge concluded in the Report that any claims against state actors must be brought under 42 U.S.C. § 1983 rather than 42 U.S.C. § 1981 under the decision of the United States Supreme Court in Jett v. Dallas Independent School District, 491 U.S. 701(1989).[8] The Magistrate noted that although the law in the Eleventh Circuit was (at the time of the Report) unsettled as to the continued validity of Jett following the enactment of the Civil Rights Act of 1991, the Magistrate noted that courts in this Circuit have continued to rely on the Jett decision as unaltered by the 1991 Act, even though other courts have found Jett to have been overruled by the legislative change. See. e.g., Federation of African-American Contractors v. Oakland, 96 F.3d 1204 (9th Cir. 1996).

Since the issuance of the Report and Recommendation the Eleventh Circuit has ruled on this question in accord with the conclusion in the Report and Recommendation. In Butts v. County of Volusia, 222 F.3d 891, 892 (11th Cir. 2000), the Court "conclude[d that] the amendments [in 1991]

8Although the discussion on this point in the Report relates to Titusville - the claims against whom have now been settled -- the analysis is also applicable to Acadia and Wells Fargo insofar as they are alleged to be state actors.

did not change § 1981[,] and § 1983 contains the sole cause of
action against state actors for violations of § 1981." Hence, the Magistrate Judge correctly concluded that Plaintiffs cannot bring a claim against state actors under § 1981 but must instead pursue such claims under § 1983 only.

As noted above, the Report concludes that Plaintiffs sufficiently allege state action by Acadia and Wells Fargo to withstand the motions to dismiss as to the § 1983 claims. The Report explains that if Acadia and Wells Fargo are found to be state actors, the § 1981 claim against them should be dismissed but that if they are not found to be state actors, the § 1981 claim against them can proceed. Hence, the Report recommends that the § 1981 claim against Acadia and Wells Fargo "be allowed as alternative pleading at this stage of the case." (Doc. 94, at 19). The Court agrees with this recommendation, and Plaintiffs may alternatively plead their § 1981 and § 1983 claims.

E. Counts IV and V -- Conspiracy to Deny Rights Under 42 U.S.C. § 1985(3) and Violation of 42 U.S.C. § 1986

In Count IV of the Third Amended Complaint, Plaintiffs allege that the Defendants conspired to deny their rights, in violation of 42 U.S.C. § 1985(3). In Count V, Plaintiffs allege violation of 42 U.S.C. § 1986. The Magistrate's Report recommends dismissal of both of these Counts in their entirety because "Plaintiffs have not pleaded even general facts sufficient to support a conspiracy claim." (Doc. 94, at 20). Plaintiffs object to this conclusion but acknowledge "that lack of a § 1985 claim will preclude a claim under § 1986." (Doc. 134, at 11). After considering Plaintiffs' objections to this recommendation and the Defendants' responses thereto, the Court agrees with the conclusion in the

Report that Plaintiffs have not sufficiently alleged a cause of action under 42 U.S.C. § 1985(3) or 42 U.S.C. § 1986. Accordingly, the motions to dismiss Counts IV and V will be granted.

F. Injunctive Relief

In their Third Amended Complaint, Plaintiffs demanded injunctive relief in addition to seeking damages. The Report recommends dismissing the claim for injunctive relief in light of Plaintiffs' concession in a later pleading (Doc. 77) that rescission of the "trespass" nullified the need for injunctive relief. Plaintiffs have not objected to this portion of the Report and Recommendation, and the Report correctly concludes that, as acknowledged by Plaintiffs in a prior document (Doc. 77), the request for injunctive relief is moot and should be dismissed as such.

II. Plaintiffs' Motions to Amend (Docs. 167 and 177)

Plaintiffs have filed two Motions to Amend (Docs. 167 and 177) since the issuance of the Report and Recommendation. Attached to one Motion (Doc. 167) is a proposed Verified Fourth Amended Complaint, and attached to the other Motion (Doc. 177) is a proposed Verified Fifth Amended Complaint which purportedly amends the proposed Verified Fourth Amended Complaint.

In support of their Motions, Plaintiffs contend that amendment is necessary in light of an alleged change in Eleventh Circuit case law, i.e. Butts, and to add a "companion" claim under 42 U.S.C. § 1982 for race-based denial of property rights. Acadia has filed responses (Docs. 172 and 182) in opposition to Plaintiffs' motions.

Plaintiffs filed their Third Amended Complaint in November 3, 1999 and did not move for leave to again amend until July 2000--- sixteen

months after they filed their first complaint in a case which was originally scheduled to be tried eighteen months after it was filed. The instant motions for leave were also filed after the United States Magistrate Judge had issued a Report and Recommendation regarding the motions to dismiss the Third Amended Complaint and after all parties had filed objections and responses to the Report. Plaintiffs have not alleged any basis for not stating a claim under 42 U.S.C. § 1982 earlier. Additionally, the second Motion (Doc. 177) was filed nearly two months beyond the deadline for filing of motions to amend pleadings established by the Amended Case Management and Scheduling Order (Doc. 137, filed June 1, 2000). Although Plaintiffs' Motion for Leave to File a Fourth Amended Complaint (Doc. 167) was filed on the last day for motions to amend pleadings pursuant to the amended case schedule, the original deadline for motions to amend was May 15, 2000 and was not extended until the Amended Case Management and Scheduling Order was entered on June 1, 2000. Additionally, all parties had filed dispositive motions based on the Third Amended Complaint nearly two months prior to the filing of the first of the motions at issue here (Doc. 167).

Although leave to amend is to be "freely given when justice so requires," Fed R. Civ. P. 15(a), the Court finds that justice does not require allowing Plaintiffs to amend their complaint again. Plaintiffs have already amended their complaint three times, and the parties have expended significant resources arguing the merits of the motions to dismiss the Third Amended Complaint. Although Plaintiffs argue that their prior amendments were merely to add parties or to cure defects identified by the Court, Plaintiffs must avail themselves of the leave they are given rather than assuming that repeated requests for leave to amend will be granted. Plaintiffs filed the instant motions to amend

approximately eighteen months after the initial complaint was filed and nine months after the Third Amended Complaint was filed. Defendants point out that Plaintiffs were aware of the facts giving rise to the proposed § 1982 claim at the time the initial complaint was filed, and discovery was completed or nearly completed at the time the motions for leave to amend were filed. Moreover, the Court does not agree with Plaintiffs that the Butts decision necessitates leave to amend. Under these circumstances, the interests of justice do not require that Plaintiffs be permitted to amend their complaint yet again. Cf. Foman v. Davis, 371 U.S. 178, 182 (1962) (noting that bases for denying leave to amend include "repeated failure to cure deficiencies by amendments previously allowed" and "undue delay"); Brewer-Giorgio v. Producers Video Inc., 216 F.3d 1281(11th Cir. 2000) (finding no abuse of discretion in district court's denial of leave to amend where, inter alia, plaintiff sought to amend more than a year after original complaint was filed and plaintiff did not justify the delay). Plaintiffs shall be permitted to proceed only with the claims remaining in the Third Amended Complaint after issuance of this Order.

CONCLUSION

Based on the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

1. The Report and Recommendation (Doc. 94) is **ADOPTED** and **CONFIRMED** and made part of this Order except as specifically excluded by this Order.

2. The Motions to Dismiss (Docs. 58 and 63) are **GRANTED in part** and **DENIED in part.**

3. Plaintiffs freedom of association and freedom of petition claims in Count II of the Third Amended Complaint (Doc. 57) are **DISMISSED.** The

freedom of speech claims in Count II remain pending, as does Count I.

4. Counts III, IV, and V of the Third Amended Complaint (Doc. 57) are **DISMISSED.**

5. Plaintiffs' claims for injunctive relief are **DENIED** as moot.

6. Plaintiffs' Motion to Amend (Doc. 167) is **DENIED.**

7. Plaintiffs' Motion to Supplement or Amend Complaint (Doc. 177) is **DENIED.**

8. Defendant SearsTown Mall Association, Inc.'s Motion to Dismiss Plaintiffs' Third Amended Complaint (Doc. 59) is **DENIED as moot.**

9. Defendant City of Titusville's Motion to Dismiss Plaintiffs' Third Amended Complaint (Doc. 61) is **DENIED as moot.**

10. Plaintiffs' Motion for Partial Summary Judgment Against Defendant City of Titusville (Doc. 96) is **DENIED as moot.**

11. Defendant SearsTown Mall Association, Inc.'s Dispositive Motion for Summary Final Judgment (Doc. 125) is **DENIED as moot.**

12. Defendant City of Titusville's Motion for Summary Judgment (Doc. 126) is **DENIED as moot.**

DONE and **ORDERED** Chambers, Orlando, Florida this 10 [sic] day of January, 2001.

/s
JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HELEN EDWARDS, et al.,
Plaintiffs,

-vs- Case No.
6:99-cv-110-Orl-28KRS

ACADIA REALTY TRUST, INC., et al.,
Defendants.
_____/

ORDER

Plaintiffs brought this action alleging that their rights were violated as a result of their opposition to racial discrimination by Defendants against third parties. In Plaintiffs' Third Amended Complaint (Doc. 57), Plaintiffs alleged five counts against four Defendants -Acadia Realty Trust, Inc. ("Acadia"), Wells Fargo Guard Service, Inc. of Florida ("Wells Fargo"), Searstown Mall Association, Inc. ("STMA"), and the City of Titusville ("Titusville'). The claims against STMA and Titusville have been settled, leaving only Acadia and Wells Fargo as Defendants herein. Additionally, this Court previously dismissed Counts III, IV, and V of the Third Amended Complaint as well as a portion of Count II (Order, Doc. 207). The only remaining claims are Count I (race-based denial of public accommodation under 42 U.S.C. § 1981) and part of Count II (violation of free speech rights --42 U.S.C. § 1983).

This cause is now before the Court on several motions for summary judgment and partial summary judgment: Plaintiffs' Motion for Partial Summary Judgment Against Defendants Acadia Realty Trust, Searstown Mall Association, and Wells Fargo of Florida Guard Services (Doc. 98); Defendant, Acadia

Realty Trust Inc.'s Motion for Final Summary Judgment and Supporting Memorandum of Law (Doc. 106); Defendant Wells Fargo Guard Services, Inc.'s Response in Opposition to Plaintiff s Motion for Partial Summary Judgment and Dispositive Cross Motion for Summary Judgment and Incorporated Memorandum of Law (Doc. 139); and Plaintiffs' Second Motion for Partial Summary Judgment and Incorporated Memorandum of Law (Doc. 178). Upon consideration of the record in this matter, oral argument presented by the parties on January 12, 2001, and pertinent case law and as more specifically set forth below, the Court concludes that there are no genuine issues of material fact remaining, that Plaintiffs' motions should be denied, that Defendants' motions should be granted, and that judgment should be entered in favor of Defendants on all remaining claims in this matter.

I. Factual Background[1]

Plaintiffs are residents of Titusville, Florida and are "not of the Negro race." (Third Amended Complaint, Doc, 57, ¶ 2). The SearsTown Mall in Titusville has numerous tenants, including Sears, a beauty supply store, a State of Florida unemployment office, a movie theater, and at least one restaurant. Defendant Acadia owned the mall until late January or early February 1999, at which time the mall was sold to Defendant STMA. Defendant Wells Fargo provided security services for the mall.

On the evening of November 20, 1998, Plaintiffs went to the mall with their two sons and a friend of their sons. While the boys saw a movie, Plaintiffs ate dinner at a mall restaurant. While they

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1The facts are largely undisputed; in areas of dispute, unless otherwise noted Plaintiffs' version of events has been conveyed.

ate, they noticed five black girls -- ranging in age from five years to mid- to late teens -- eating in an adjacent booth. Plaintiffs describe the girls, who were not accompanied by an adult, as well-behaved in the restaurant.

After finishing dinner, Plaintiffs walked through the mall, browsed in the Sears store, and then sat down on a bench outside the movie theater to wait for their children. As the Edwardses were proceeding from Sears to the bench, they observed the five black girls whom they had seen in the restaurant standing nearby. Two security guards approached the girls, and one of the guards asked the girls in an authoritative voice what their business was. The girls responded that they were waiting for their parents, and the guard told the girls they needed to leave. According to the Edwardses, the oldest girl told the guard that they needed to wait inside until their parents came to pick them up. The guard replied that he did not care and that the girls needed to "get [their] asses out of here"; Mrs. Edwards testified in her deposition that the guard used the term "black asses" although Mr. Edwards did not report this terminology. The girls then walked outside the mall.

The Edwardses sat on a bench for ten to fifteen minutes waiting for their children to emerge from the movie theater. While they sat there, the security guards approached two or three unaccompanied teenage black boys in front of the movie entrance. One guard asked the boys what they were doing. When one of the boys responded that they were going to the movies, the guard replied, "Then you need to get there." The boys went into the movie theater. At that time, Mrs. Edwards did not feel that the guards had treated the boys improperly (Helen Edwards Dep., Doc. 111, at 48).

Just after the black boys walked into the movie theater, and while the Edwardses were still seated on the bench outside the theater, the five black girls came back inside the mall and walked toward the

telephone behind the Edwardses. The girls made a telephone call and then proceeded into a nearby retail store. The guards followed the girls into the store, about three or four feet behind. The girls looked around in the store and then left, with the guards still following them. One guard again told the girls that they needed to go outside, and the girls then exited the mall.

As the guards were following the black girls out of the retail store, Mrs. Edwards asked the guards if the girls had done something wrong. One guard told Mrs. Edwards it wasn't any of her business. Mrs. Edwards pointed out that the girls had told the guards they were waiting for their parents and were not supposed to be outside. The guard responded, "They don't belong here" or "They have no business here." Mrs. Edwards told the guard that she had watched the guard follow the girls around and throw the girls out twice and opined that the guard was discriminating against the girls based on their race. The guard told Mrs. Edwards to shut her mouth and stay out of it. Mrs. Edwards told the guard he had no right to tell her to shut her mouth. According to the Edwardses, the guard then pulled out his flashlight, put it in Mrs. Edwards's face, and again told her to shut her mouth or he would have a trespass warning issued against her. Mr. Edwards then told the guard to leave Mrs. Edwards alone. The guard said he was going to call the police and left.

The Edwardses saw other children in the mall that evening, but they have identified only two other sets of unaccompanied children - one group of white children sitting on a bench eating pizza purchased at the restaurant and one group of white girls who made a phone call. The white girls were, according to the Edwardses, the loudest group in the mall, and they asked the Edwardses for change for the phone, which the Edwardses provided. The Edwardses did not complain about the children, and the Edwardses had no knowledge as to whether the guards saw those

unaccompanied groups of children that evening or whether the guards inquired about their business or escorted them outside at some point that night.

According to the security guard, Andrew Bankowski, the black girls had told him they were supposed to have gone to a 7:00 movie but they instead had left the mall and came back inside at about 8:15. When the girls went into the store, a sales clerk in the store motioned for him to go into the store and he did so and then followed the girls out. Bankowski stated in his deposition that he was taking the children outside because the movies were about to let out and the security guards oversee children outside for their safety and security. Bankowski explained that it is better from a security standpoint for the children to be in the well-lighted area outside where the security guards can observe them directly. Additionally, parents picking up their children park outside and do not want to have to go inside the mall to retrieve their children. Bankowski tried to explain the situation to Mrs. Edwards when she confronted him, but she would not listen; Mrs. Edwards acknowledged in her deposition that she "didn't give [Bankowski] a chance" to explain his actions (Helen Edwards Dep., Doc. 111, at 66).

After Bankowski left to call the police, the Edwardses' children came out of the movie theater and they all proceeded to the parking lot. The police had arrived, and they issued a trespass warning against the Edwardses, barring them from returning to the mall premises for two years. When the Edwardses asked the reason for the trespass warning, the police said it was because the guards had requested that the trespass warning be issued. According to the Edwardses, they explained to the officers that the guards had requested the trespass warning because of their opposition to the harassment of the black girls. The police officer suggested that the Edwardses contact the mall management the next day to straighten out the

matter of the trespass warning.

The Edwardses did not contact the mall the next day as suggested by the police officers, nor did they complain to the police, the city, or Wells Fargo. Instead, the Edwardses consulted with an attorney. The instant lawsuit was filed in this court on February 1, 1999 (Doc. 1). On February 9, 1999 -- after the instant case had been initiated -- Mr. Edwards for the first time called Debra Hardy, the manager of the mall,[2] to request rescission of the trespass warning (Christopher Edwards Dep., Doc. 109, at 175). It is undisputed that the trespass warning was revoked about ten days later.

Mrs. Edwards testified at her deposition that neither she nor her family had any other encounters with the mall security guards before or after the November 1998 incident except on one occasion after the trespass warning had been rescinded.[3] In the later incident, her sons and nephew were walking through the mall while Mr. and Mrs. Edwards ate dinner at a mall restaurant. The security guards approached the unaccompanied Edwards children and told them to get back with their parents. There was no indication to Mrs. Edwards that the guard recognized the children as hers or that the guard's actions on that occasion were motivated by skin color. Mrs. Edwards testified that the day the security guards approached her children was the only time her children had been in the mall unaccompanied by an adult.

2Hardy was employed as the mall manager at all relevant times hereto - she was employed by Acadia at the time of the November 20, 1998 incident, and after the mall was sold in early 1999 she continued as mall manager in the employ of STMA.

3This incident apparently occurred around Thanksgiving 1999.

II. Legal Discussion

Summary Judgment Standards

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of establishing that no genuine issues of material fact remain. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

In ruling on a motion for summary judgment, the Court construes the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), However, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. In ruling on a motion for summary judgment, "'[t]he function of the court is not to 'weigh the evidence and determine the truth of the matter but to determine whether there is an issue for trial.'" Lockett v. Wal-Mart Stores. Inc., 2000 WL 284295, *2 (S.D. Ala. Mar. 8, 2000) (quoting Anderson, 477 U.S. at 249).

When faced with a "properly supported motion for summary judgment, [the nonmoving party] must come forward with specific factual evidence, presenting more than mere allegations." Gargiulo v. G.M. Sales, Inc., 131 F.3d 995, 999 (11th Cir. 1997). "The evidence presented cannot consist of conclusory allegations or legal conclusions." Avirgan v. Hull, 932 F.2d 1572, 1577 (11th Cir. 1991); see also Fed. R. Civ. P. 56(e) (providing that nonmovant's response "must set forth specific facts showing that there is a

genuine issue for trial").

Count I -- Race-Based Denial of Public Accommodation Under 42 U.S.C. § 1981

In Count I of their Third Amended Complaint, Plaintiffs bring claims against Acadia and Wells Fargo for race-based denial of a public accommodation under 42 U.S.C. § 1981.[4] Plaintiffs contend that they

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4This section provides:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are

were denied the right to full and equal benefit of the laws when they were issued the trespass warning and banned from the mall.

In order to prevail on a claim under section 1981, a plaintiff must establish, inter alia, intentional race-based discrimination. As the court noted in Smith v. Dallas County Bd. of Educ., 480 F. Supp. 1324 (S.D. Ala. 1979):

> The [s]ine qua non of a complaint under section 1981 is a showing of racial discrimination . . . .
>
> The Court recognizes that motive and intent are crucial in determining whether an alleged violation of section 1981 has occurred. But just because racial animus is important, that does not suspend the application of Rule 56. In response to the motion for summary judgment the plaintiffs presented no significant probative evidence either to support the allegations of racial discrimination in the complaint or to show that a genuine issue as to a material fact exists. Simple dissatisfaction with the results of the testing does not translate into racial discrimination. The Court is satisfied that whatever the results of the academic placement testing is in Dallas County no racial animus is present. Accordingly, the defendants' motion for summary judgment as to the section 1981 claim is granted.

480 F. Supp. 2d at 1336 (citations omitted).

In the instant case, as in Smith, Plaintiffs have failed to present any evidence creating a genuine

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> protected against impairment by nongovernmental discrimination and impairment under color of State law.

issue of fact as to racial animus. First, as to Acadia, there is absolutely no evidence of discriminatory intent or even any involvement in the November 20, 1998 incident. There was no mall manager present at the time of the incident, and Plaintiffs had no contact with anyone at the mall until February 1999 -- after which the trespass warning was soon rescinded. Plaintiffs have presented no evidence of a mall policy to discriminate, and there is no evidence that Acadia directed Wells Fargo to act in a discriminatory manner, acted in concert with Wells Fargo, or was even aware of Bankowski's alleged discriminatory actions until Mr. Edwards called Hardy in February 1999 to have the trespass warning rescinded. Hence, there is no evidence that Acadia acted with the discriminatory intent required for recovery under section 1981.

As to Wells Fargo, the record evidence -- including the statement by Mrs. Edwards that her own, white children were asked to go back to their parents by the security guards on the only occasion when they were not accompanied by an adult -- points to neutral actions by the guards regarding *unaccompanied children* in general rather than *children of a certain race or color*. The fact that the Edwardses saw the security guards -- during approximately fifteen minutes seated on a bench in one particular area of the mall -- question two groups of unaccompanied black children regarding their business at the mall and ask the girls to wait outside does not in and of itself constitute probative evidence of racial discrimination. Plaintiffs admit that they did not feel that the guards acted improperly toward the boys, that they have no knowledge or evidence of whether the guards noticed any other groups of unaccompanied children that evening, and that they have no knowledge or evidence of whether the guards in fact escorted any other children out of the mall on the evening of the incident. At best, Plaintiffs have presented a mere scintilla of evidence of intent, which

is not sufficient to preclude summary judgment. In short, no reasonable jury could find discriminatory intent on this record. See Anderson, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."); accord Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir.1997); see also Bibbs v. Bd. of Trs., 9 F. Supp. 2d 964, 973-74 (N.D. Ill. 1998) (granting summary judgment where there was "not a scintilla of evidence" of racial animus and "the undisputed evidence would not allow a reasonable jury to return a verdict in support of [the] claim of racial discrimination"), aff'd, 191 F.3d 455 (7th Cir. 1999); cf. Brantley v. Runyon, 1999 WL 195658, *4 (6th Cir. Mar. 8, 1999) (noting that plaintiff's contention that supervisor's "perception was based on racial stereotyping is sheer speculation and conjecture"); Reyes v. City of Dinuba, 1992 WL 289553, *1 (9th Cir. Oct. 14, 1992) (affirming summary judgment where "racial animus [could] not reasonably be inferred from the evidence"); Zephyr v. Ortho McNeil Pharm., 62 F. Supp. 2d 599, 607 (D. Conn. 1999) (granting summary judgment where case "present[ed] the Court with nothing more than pure and legally inadequate speculation that racial animus motivated the alleged discriminatory treatment of the plaintiff"); Brady v. Cheltenham Township, 1998 WL 164994, *7 (E.D. Pa. Apr. 9, 1998) (finding that "scintilla of circumstantial evidence, absent more, is insufficient to support a rational jury's inference of racial discrimination" and that "[t]he evidence presented fail[ed] to bolster plaintiffs' conclusory allegations of racial animus, which are inadequate to create an issue of fact that would prevent the court from granting summary judgment" on section 1981 claims); Sampson v. Vill. Disc. Outlet, Inc., 832 F. Supp. 1163, 1167 (N.D. Ill. 1993) ("[T]he commission of an offense accompanied by a single racist remark will not sufficiently demonstrate that a racial animus

was a motivating factor of the offense."), aff'd, 43 F.3d 1474 (7th Cir. 1994).

Furthermore, Plaintiffs' argument that Bankowski had them banished in retaliation for their opposition to *what they believed in good faith* to be racial discrimination is unavailing. Plaintiffs' reaction under the circumstances was based on nothing more than an assumption that Bankowski was acting with racial animus when he escorted the girls out of the mall. The law does not elevate the rights of non-minority observers over those of minority members who suffer no discrimination. In other words, Plaintiffs have no greater rights than the children from whom their claim stems, and therefore their "good faith belief" rings hollow once it is shown, as here, that there is no significant probative evidence of underlying discrimination. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' claims under 42 U.S.C. § 1981.[5]

Count II -- Violation of Plaintiffs' Free Speech Rights under the First and Fourteenth Amendments/42 U.S.C. § 1983

In Count II, Plaintiffs claim under 42 U.S.C. § 1983[6] that Defendants' actions violated their free

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5The Court's disposition of the issue of racial animus renders moot the ether issues pertinent to the section 1981 claims.

6This section provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

speech rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs seek relief from Wells Fargo and Acadia based on the actions of the employees of these entities -- security guard Andrew Bankowski and mall manager Debra Hardy, respectively.

As the Eleventh Circuit has noted, "A defendant cannot be held liable under section 1983 on a respondent superior or vicarious liability basis." Harvey v. Harvey, 949 F.2d 1127, 1130 (11th Cir. 1992) (citing Monell v. Department of Social Servs., 436 U.S. 658, 98 S. Ct. 2018, 59 L.Ed.2d 611 (1978)). This rule applies to both municipal and private corporations. Harvey, 949 F.2d at 1130.[7]

> secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

[7]The Court declines Plaintiffs' invitation to reject prevailing law on this point and to adopt a new rule allowing respondent superior liability for private corporations in section 1983 cases. Plaintiffs cite Taylor v. Plousis, 101 F. Supp. 2d 255 (D.N.J. 2000), for the proposition that respondent superior liability should apply to private corporations even though it does not extend to governmental entities. In a footnote, the Taylor court did question the policy behind extension of Monell to private corporations. 101 F. Supp. 2d at 263 n.4. However, the court acknowledged that "the majority of courts to have considered the issue have determined that. . . a [private] corporation may not be held vicariously liable under § 1983" and "accept[ed] the reasoning in these cases." 101 F. Supp. 2d at 263. If the rule is to be changed in this circuit, that task is for the Court of Appeals. Cf. Scutieri v. Estate of Revitz, 683 F. Supp. 795, 800 (S.D.

However, a corporation may be held liable for the unconstitutional acts of employees where there is a policy, custom, or action by those who represent official policy which causes the injury. See, e.g., Davis v. DeKalb County Sch. Dist., 233 F.3d 1367, 1375 (11th Cir. 2000) (noting that for municipality to be liable under section 1983 acts must be "acts which the municipality has officially sanctioned or ordered"); Busby v. City of Orlando, 931 F.2d 764, 776 (11th Cir. 1991) ("[I]n order to recover against a municipality, a plaintiff must establish that the alleged racial discrimination or harassment occurred pursuant to a custom or policy of the municipality."); Scutieri v. Estate of Revitz, 683 F. Supp. 795, 800 (S.D. Fla. 1988) (noting "exception to rule of no vicarious liability under Section 1983 where there is policy-making employee and there was a policy which was the moving force of the constitutional violation"). Although this Court found in ruling on the motions to dismiss that Plaintiffs had sufficiently *alleged* a custom or policy by the Defendants, the Plaintiffs have not *presented evidence* sufficient to survive the Defendants' motions for summary judgment on this issue. Considering the affidavits and depositions in the record, there is simply no evidence supporting Plaintiffs' claims that the actions taken by the individual employees of these corporate defendants constitute the official policies of those entities. Accordingly, the Plaintiffs' section 1983 claims fail.

The Court agrees with Defendants that Plaintiffs have not presented any evidence supporting their claim that Bankowski and Hardy implemented

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Fla. 1988) (discussing Monell and holding that "as a matter of law[] a private corporation cannot be liable strictly on the basis of a respondeat superior theory under Section 1983").

a policy, custom, or practice of their employers to discriminate based on race or to retaliate against those who oppose such discrimination. First, as discussed above in connection with the section 1981 claim, there is no evidence that Hardy or anyone at Acadia participated in the November 20, 1998 incident or was even aware of the alleged discrimination until after this suit was filed. Hence, even assuming arguendo that Hardy is a policy-making employee -- a conclusion which is not supported by the evidence -- there are no actions by Hardy which could trigger liability for Acadia, nor is there any evidence of a discriminatory Acadia policy. Additionally, there is no support in the record for Plaintiffs' contention that Wells Fargo's security guard, Bankowski, was a policy-making employee or that he acted pursuant to a corporate policy of discrimination. Plaintiffs' bare, conclusory allegations of the existence of such a policy are insufficient to raise an issue of fact, and Defendants have met their burden of establishing the absence of a genuine issue of material fact as to the existence of a custom or policy. Accordingly, Defendants' motions for summary judgment on the section 1983 claims shall be granted.[8]

III. Conclusion

In accordance with the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendant, Acadia Realty Trust Inc.'s Motion

8In light of the disposition of the respondeat superior liability issue, the Court finds it unnecessary to reach the remaining issues on the section 1983 claims, including Plaintiffs' standing and whether Acadia and Wells Fargo were state actors in the context of this litigation.

for Final Summary Judgment (Doc. 106) is **GRANTED.**

2. Defendant Wells Fargo Guard Services, Inc.'s Dispositive Cross Motion for Summary Judgment (Doc. 139) is **GRANTED.**

3. Plaintiffs' Motion for Partial Summary Judgment Against Defendants Acadia Realty Trust, Searstown Mall Association, and Wells Fargo of Florida Guard Services (Doc. 98) is **DENIED.**

4. Plaintiffs' Second Motion for Partial Summary Judgment (Doc. 178) is **DENIED.**

5. All other pending motions are **DENIED as moot.**

6. The Clerk is directed to enter judgment for Acadia Realty Trust, Inc. and Wells Fargo Guard Service, Inc. of Florida in accordance with this Order and thereafter to close the file.

DONE and **ORDERED** in Orlando, Florida this 9th day of March, 2001.

_____

JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HELEN EDWARDS, et al.,

Plaintiffs,

-vs- Case No. 6:99-cv-110-Orl-99A

ACADIA REALTY TRUST, INC., et al.,

Defendants.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT

This cause came on for consideration without oral argument on the following motions filed herein:

MOTION: **DEFENDANT ACADIA REALTY TRUST, INC.'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT (Docket No.58)**

FILED: **NOVEMBER 22, 1999**

THEREON it is **RESPECTFULLY RECOMMENDED** that the motion be **GRANTED in part and DENIED in part.**

MOTION: **DEFENDANT SEARSTOWN MALL ASSOCIATION, INC.'S MOTION TO DISMISS PLAINTIFFS THIRD AMENDED COMPLAINT (Docket No. 59)**

FILED: **NOVEMBER 22, 1999**

THEREON it is **RESPECTFULLY RECOMMENDED** that the motion be **GRANTED in part, and DENIED in part.**

MOTION: **DEFENDANT CITY OF TITUSVILLE'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT (Docket No. 61)**

FILED: **NOVEMBER 22, 1999**

THEREON it is **RESPECTFULLY RECOMMENDED** that the motion be **GRANTED in part and DENIED in part.**

MOTION: **DEFENDANT WELL FARGO GUARD SERVICE, INC'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT (Docket No. 63)**

FILED: **DECEMBER 1, 1999**

THEREON it is **RESPECTFULLY RECOMMENDED** that the motion be **GRANTED in part and DENIED in part.**

I. PROCEDURAL HISTORY.

Plaintiffs Helen Edwards and Christopher Edwards ("Plaintiffs") filed their first complaint on February 1, 1999 against Defendants Acadia Realty Trust, Inc. (" Acadia"), and the City of Titusville (the "City") alleging violation of constitutional and civil rights. (Docket No.1). Plaintiffs also claimed civil conspiracy and negligent training and supervision against Acadia. (*Id.).* Plaintiffs filed a first and second amended complaint adding SearsTown Mall Association, Inc. ("STMA "), and Wells Fargo Guard Service, Inc. ("Wells Fargo"), respectively, as

defendants to all claims previously alleged. (Docket Nos. 5 & 38). The Honorable G. Kendall Sharp, United States District Judge, struck Plaintiffs' second amended complaint. (Docket No.56). Plaintiffs filed a third amended complaint against all defendants alleging the following: Count I -race-based denial of public accommodation under 42 U.S.C. § 1981; Count II - violation of rights of free speech, petition and association under First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983; Count III - race-based denial of public accommodation under the equal protection clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983; Count IV - conspiracy to deny rights under 42 U.S.C. § 1985(3); and Count V - violation of 42 U.S.C. § 1986. (Docket No.57). Plaintiffs requested equitable and injunctive relief including damages, costs and attorney's fees. (*Id.*). Acadia, STMA, the City and Wells Fargo filed motions to dismiss and Plaintiffs responded to those motions. (Docket Nos. 58, 59,61,63,66-69 & 71). Wells Fargo filed a notice of supplemental authority in support of its motion. (Docket No.71).

II. STATEMENT OF FACTS.

Plaintiffs reside in Titusville, Florida and are "not of the Negro race." (Docket No.57 ¶2). Acadia is a Pennsylvania corporation which owned the SearsTown mall in Titusville, Florida until February 1, 1999. (*Id.* ¶ 3). In February 1999, STMA became the owner and operator of the SearsTown mall. (*Id.* ¶4). Wells Fargo provided security guard service for the SearsTown mall. (*Id.* ¶6).

On or about November 20, 1998, Plaintiffs witnessed security guards at the SearsTown mall verbally abuse and harass black children in the mall. (Docket No.57 ¶7). The guards did not harass white children for the same or worse behavior. (*Id.* ¶7). Plaintiffs disapproved of the guards' behavior and told

one of the guards that the guards should stop discriminating against the black children. (*Id.* ¶9). One guard brandished a large, heavy flashlight, told Plaintiffs to "shut up" and leave the mall, and the guard informed them that he was going to call the police. (*Id.* ¶10). The police then "trespassed" Plaintiffs, meaning that Plaintiffs were banned from the mall for two years. (*Id.* ¶¶11 & 12). The police indicated that they had no discretion in enforcing the mall owner's request for someone to be "trespassed."[1] (*Id.* ¶53).

During its ownership of the mall, Acadia refused to rescind the "trespass." (Docket No.57 ¶13). After STMA acquired the mall, it initially refused to rescind the "trespass." (*Id.* ¶14). However, on February 19, 1999, STMA rescinded the "trespass" against Plaintiffs. (Docket No. 77, attachment). On February 23, 1999, the City informed Plaintiffs that the trespass had been withdrawn. (*Id.*).

Plaintiffs alleged that Defendants' actions were based on racial animus and animus toward people opposing racial discrimination. (Docket No.57 ¶17). Plaintiffs also alleged that the police acted pursuant to a "municipal policy and custom to automatically implement and enforce the demands of property owners and the agents of property owners to eject and banish people from those owners' property; even if, as

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1Florida's trespass law provides in relevant part as follows:

> A person who, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance...as to which notice against entering and remaining is given...by actual communication to the offender... commits the offense of trespass ...." Fla. Stat. § 810.09 (1)(a)1.

is the case regarding Plaintiffs, such demands are based on a racially discriminatory motive and the property is a place of public accommodation." (*Id.* ¶18). Plaintiffs further alleged that Defendants' conduct "implement[ed] or execute[d] a custom, policy statement, regulation, or decision officially adopted and promulgated by each Defendants' officers to maximize profits, avoid accountability, and/or evade regulations and duties regarding people who oppose discrimination." (*Id.* ¶33).

III. STANDARD OF REVIEW.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that Plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 45-46 (1957). A trial court, in ruling on a motion to dismiss, is required to view the complaint in the light most favorable to the Plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). However, in the context of civil rights, there is a heightened pleading requirement and the plaintiff must "allege with some specificity the facts which make out its claim." *GJR Investments, Inc. v. County of Escambia, Florida*, 132 F.3d 1359,1367 (11th Cir. 1998).

IV. ANALYSIS.

A. *Standing.*

Acadia, STMA and Wells Fargo contended that Plaintiffs did not have standing to raise any civil rights claims because Plaintiffs were claiming damages for harm that occurred to others. They contended that Plaintiffs did not "suffer[] an injury-in-fact that would be corrected by a favorable decision in the lawsuit." *Church v. City of Huntsville*, 30 F.3d 1332,1335 (11th Cir. 1994). Plaintiffs argued that they did have standing because they were damaged

by their exclusion from the mall for approximately three months.

"[R]acial discrimination motivated by anti-black feeling but directed against whites is actionable." *Gordon v. City of Cartersville*, 522 F. Supp. 753, 756 (N.D. Ga. 1981)(citations omitted). Several courts have found that non-minorities have standing when the non-minorities are injured by racially motivated conduct. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229,237 (1969)(non-minority had standing to bring claim against subdivision that expelled non-minority for advocating the right of a black to lease the non-minority's house); *Faraca v. Clements*, 506 F.2d 956 (5th Cir. 1975)(non-minority had standing to bring suit when non-minority was refused employment because non-minority was married to a black person); *DeMatteis v. Eastman Kodak Co.*, 511 F .2d 306 (2nd Cir. 1975)(non-minority had standing to bring action against former employer who terminated him for selling non-minority's home to black); *Adler v. Columbia Historical Society*, 690 F. Supp. 9, 15 (D.D.C. 1988)("A white person who is injured as a result of his or her efforts to defend the rights of non-whites has standing to sue under [42 U.S.C.] § 1981."); *Riccobono v. Whitpain*,497 F. Supp. 1364 (E.D. Pa. 1980)(non-minority developer had standing to bring cause of action against defendants who denied permit for skating rink because they feared the rink would attract minorities). The essential issue in determining questions of standing is whether "the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26,38 (1976). Plaintiffs did not file suit on behalf of the minorities in the mall that they felt were treated unfairly. Instead, they sued for their own injuries which can be redressed by an award of damages.

SMTA and Wells Fargo urged the Court to find Plaintiffs lacked standing based on *Evans v. Kansas*

City, Missouri School District, 65 F .3d 98 (8th Cir. 1995). In *Evans*, a high school teacher was terminated after voicing objections to a new principal's plans for the school. The teacher was concerned about the effect of the plans on the school's students, 98% of whom were black. The teacher was unable to establish a claim under Title VII, 42 U.S.C. § 2000e-3(a), because the teacher had not opposed an unlawful employment practice, but had instead opposed a policy change for the school. The teacher then argued that 42 U.S.C. § 1981 was broader than Title VII and encompassed actions that fell outside of the employment relationship. The United States Court of Appeals for the Eighth Circuit found that only the affected students or their parents could bring a claim outside of the employment context. However, in the instant case, Plaintiffs did not seek relief for the minorities they felt were treated unfairly, but instead sought to recover for their own damages due to being "trespassed" from the mall for several months. Accordingly, Plaintiffs have standing to bring their claims.

B. *Counts II and III - Claims Under 42 US.C. § 1983.*

In Count II, Plaintiffs claimed violation of their rights of free speech, petition and association under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. In Count III, Plaintiffs claimed race-based denial of public accommodation under the equal protection clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

Title 42 U.S.C. § 1983 provides in relevant part as follows

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> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ...

Thus, to state a claim under 42 U .S.C. § 1983, Plaintiffs must allege: (1) acts committed by a person acting under color of state law; and (2) deprivation of rights, privileges or immunities guaranteed under the United States Constitution or the laws of the United States. *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992)(citing *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156-57 (1978)).

1. State Action.

Acadia, STMA and Wells Fargo contended that they were not state actors and thus could not be liable under 42 U.S.C. §1983 because they lacked the requisite action under color of law. "Only in rare circumstances can a private party be viewed as a 'state actor' for section 1983 purposes." *Harvey*, 949 F.2d at 1130. The United States Court of Appeals for the Eleventh Circuit recognizes three tests to determine state action by a private actor. These are the public function test, the state compulsion test and the nexus/joint action test. *Id.*

The public function test shows private action to be state action if private actors are given the power to perform functions or do perform functions "that are 'traditionally the exclusive prerogative of the State.'" *Harvey*, 949 F.2d at 1131 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)).

Few activities fall within the exclusive powers[2] of the State. *Harvey*, 949 F.2d at 1131. The United States Court of Appeals for the Fifth Circuit has found that even detention and search of suspected shoplifters is not an exclusive function of the State. *White v. Scrivener Corp.*, 594 F.2d 140, 142-43 (5th Cir. 1979).[3] Other courts that have considered the actions of security guards have found their duties do not constitute state action. *See Wade v. Byles*, 83 F.3d 902,904 (7th Cir. 1996)(duties of lobby security guards did not constitute state action where the actions were "local in nature and limited in scope"); *United States v. Garlock*, 19 F .3d 441 (8th Cir. 1994)(investigation of crime does not transform private actor into a government actor). In the instant case, the actions of the Wells Fargo security guards did not amount to state action. Their duties were limited in scope and nature and did not intrude on those functions that were the exclusive province of the State. In addition, the actions of Acadia and STMA in refusing to allow Plaintiffs back into the mall after they had been "trespassed" did not amount to state action because they were not activities within the

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2The United States Supreme Court has found that activities such as election of public officials. Terry v. Adams, 345 U.S. 461,468-70 (1953), and operation of a company town, Marsh v. Alabama, 326 U.S. 501,505-09 (1946), constitute exclusive state powers.

3In Bonner v. City of Prichard, 661 F.2d 1206,1209 (11th Cir. 1981), the United States Court of Appeals for the Eleventh Circuit adopted all cases decided by the Fifth Circuit prior to October 1, 1981 as binding precedent.

exclusive power of the State. Thus, I find that the actions of Acadia, STMA and Wells Fargo did not amount to state action under the public function test.

As for the state compulsion test, Plaintiffs have not alleged in any manner how the State required, mandated or encouraged Acadia, STMA or Wells Fargo to undertake any actions that were discriminatory. Plaintiffs alleged that the existence of Florida' s trespass law required a finding of state action. However, "[a]bsent some compulsion or some overt state involvement, no state action can be found because of the mere existence of the statute." *White*, 594 F.2d at 143 (citing *Flagg Brothers*, 436 U.S. at 164). Accordingly, I find the actions of Acadia, STMA and Wells Fargo did not constitute state action under the state compulsion test.

The nexus/joint action test applies to situations where the "government has 'so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in the enterprise.'" *Harvey*, 949 F.2d at 1131 (quoting *NBC v. Communication Workers of America, AFL-CIO*, 860 F.2d 1022,1026 (11th Cir. 1988)). To establish this type of state action under 42 U.S.C. § 1983, the plaintiff "must plead in detail, through reference to material facts, the relationship or nature of the conspiracy between the state actor(s) and the private persons." *Harvey*, 949 F.2d at 1133 (citing *Fullman v. Graddick*, 739 F.2d 553,556-57 (11th Cir. 1984)). Merely conclusory allegations are insufficient to establish state action through joint action. *Harvey*, 949 F.2d at 1133. Stringing together the steps of the events is insufficient without showing contacts between the actors that could prove the actors reached an understanding to violate Plaintiffs' rights. *Harvey*, 949 F.2d at 1133. In the instant case, Plaintiffs allege that the defendants acted "through their concerted acts and conspiracy," were "jointly engaged," and were "willing participants in joint activity." These are conclusory allegations that are not

supported by any specific factual allegations.

However, in *Smith v. Brookshire Brothers, Inc.*, 519 F.2d 93 (5th Cir. 1975), the United States Court of Appeals for the Fifth Circuit found that concerted action could transform private action into state action if the record showed that police did not conduct an independent investigation before making arrests based solely on the accusations of shopkeepers.[4] In the instant case, Plaintiffs alleged that there was a policy or custom to automatically implement and enforce the demands of property owners even if those requests were discriminatory .Under *Smith*, this allegation is sufficient to preclude dismissal based on lack of state action for Acadia and Wells Fargo.[5] However, it is insufficient as to STMA. Plaintiffs did not allege that the same agreement existed regarding STMA and the police or that STMA had any part in the original "trespassing" of Plaintiffs. Plaintiffs did not allege that part of this joint state action was that future owners would refuse to rescind previously

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4See also Duriso v. K-Mart, 559 F.2d 1274 (5th Cir. 1977).

5In the supplemental authority filed by Wells Fargo, LaFontant v. Burdines, Inc., No. 97-4102-CIV-GRAHAM, slip op. at 6 (S.D. Fla. Feb. 3, 1999), the United States District Court for the Southern District of Florida indicated that alleging a "meeting of the minds" was insufficient to show joint action for purposes of establishing state action. However, there was no evidence that the plaintiff in LaFontant alleged the type of automatic state action that was alleged by Plaintiffs in the instant case. Thus, the actions alleged in LaFontant would not fall within the ambit of Smith and are therefore distinguishable from the instant Plaintiffs' claims.

issued "trespass" orders. The only actions alleged against STMA, refusing to rescind a "trespass" already in place, did not convert STMA into a state actor. Thus, I respectfully recommend that the motion to dismiss STMA be GRANTED as to Counts II and III.

2. No Recovery Based on Respondeat Superior.

a. Acadia.

Acadia contended that Plaintiffs' claims against it should be dismissed because they were based upon a theory of *respondeat superior*, seeking to hold Acadia responsible for the actions of the security guards. "[A]s a matter of law, a private corporation cannot be liable strictly on the basis of a *respondeat superior* theory under Section 1983." *Scutieri v. Revitz*, 683 F. Supp. 795,800 (S.D. Fla. 1988); *see also Sanders v. Sears, Roebuck & Co.*, 984 F.2d 972,975-76 (8th Cir. 1993)(corporation will only be held liable under § 1983 for its policies, not for actions of private parties). "Absent a 'policy, custom or action by those who represent official policy that inflicts injury actionable under § 1983, a corporate defendant will not be liable for the unconstitutional acts of its employees." *Rey v. Kmart Corp.*, No. 97-3912-CIV-GOLD, 1998 WL 656070 at * 5 (S.D. Fla. July 21, 1998)(quoting *Sanders*, 984 F .2d at 975). One unconstitutional action cannot support an inference that the action was taken pursuant to an illegal policy. *Iskander v. Village of Forest Park*, 690 F.2d 126, 128-29 (7th Cir. 1982).

Plaintiffs' claims against Acadia are based on its "trespassing" of them and its refusal to revoke the "trespass" when the events surrounding its issuance were explained. Plaintiffs alleged that Acadia' s conduct was pursuant to a custom or policy to maximize profits, avoid accountability, and evade regulations regarding people who opposed discrimination. Plaintiffs have alleged a custom or

policy of violating rights and evading duties to follow nondiscriminatory policies. This allegation is sufficient to withstand a motion to dismiss. Thus, I respectfully recommend that the motion to dismiss Acadia on this basis be DENIED.

b. The City

The City argued that Plaintiffs failed to plead sufficient facts to establish that the actions taken were pursuant to a municipal policy, practice or custom. Plaintiffs' claims against the City were based on its policy or custom of automatically trespassing someone at the request of the owner of the property without any investigation, even if the request was discriminatory.

Local governments can be sued directly under 42 U.S.C. § 1983 only if the actions that are alleged to be unconstitutional implement or execute a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body's officers." *Monnell v. Dept. of Social Services*, 436 U.S. 658,690 (1978). A local government may also be sued for unconstitutional actions undertaken pursuant to a custom, "even though such a custom has not received formal approval through the body's official decision making channels." *Monnell*, 436 U.S. at 690-91.

Plaintiffs claimed the City had a custom or policy of automatically implementing and enforcing the demands of property owners to eject persons from their property even if such actions were discriminatory. They also alleged that the City was evading regulations and duties toward those who opposed discrimination and that these policies had been promulgated by the City's officers. Plaintiffs have sufficiently stated an allegation of the custom or policy required to withstand a motion to dismiss. Accordingly, the motion to dismiss the claims against the City on that basis should be DENIED.

3. Intention to Violate Rights of Free Speech. Petition and Association.[6]

a. Free Speech.

The City argued that even-handed enforcement of Florida' s trespass-after-warning statute did not violate Plaintiffs' rights to free speech, petition and association. "Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute. .. ." *Adderly v. State of Florida*, 385 U.S. 39,47 (1966). Plaintiffs alleged that they were retaliated against for their remarks to the guards concerning the impropriety of their conduct toward minorities. Plaintiffs alleged that the mall was a place of public accommodation and that the Defendants acted pursuant to a policy to evade regulations and duties toward those who opposed discrimination.

The United States Court of Appeals for the Eleventh Circuit has held that as applied to a nonpublic forum, Housing Authority property, Florida's trespass statute did not violate the First or Fourteenth Amendments to the United States Constitution. *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994). However, reading the complaint in the light most favorable to Plaintiffs, they contend that the mall is a place of public accommodation as opposed to the nonpublic forum in *Daniel*. The United States Supreme Court has addressed the issue of First Amendment activity within a mall in the context of the distribution of handbill invitations to a meeting to protest the draft and the Vietnam War. *Lloyd Corp.*

6The following analysis under 42 U.S.C. § 1983 only addresses actions of Acadia, Wells Fargo and the City because I have recommended that the motion to dismiss be granted as to STMA under Counts II and III.

v. Tanner, 407 U.S. 551 (1972). The Supreme Court found that the mall's strictly enforced policy of prohibiting handbilling did not violate the First Amendment rights of the handbillers where the handbilling was not related to any activities within the mall and where the handbillers had adequate alternative means of communication. In the instant case, Plaintiffs allegations concerned the activity within the mall itself. In addition, it does not appear that Plaintiffs' speech would have been effective had they been in any location other than within the mall where the discrimination occurred. Thus, Plaintiffs have stated a claim distinct from that in *Tanner*.

Even if the mall were found to be a nonpublic forum, the restrictions would need to be "content-neutral and reasonable" to pass constitutional muster. *Daniel*, 38 F. 3d at 550.[7] However, Plaintiffs specifically alleged that they were retaliated against because of the viewpoint expressed in their speech, namely, that they opposed discriminatory treatment of minorities. Thus, Plaintiffs have sufficiently stated a claim under the First Amendment as to their freedom of speech.

b. Freedom of Association.

Concerning freedom of association, Plaintiffs only alleged that Defendants desired to prevent Plaintiffs from exercising their rights of free speech, petition and association. Plaintiffs did not allege the type of association they were claiming with the

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7See also United States v. Kokinda, 497 U.S. 720,730 (1990)(in a nonpublic forum, distinctions concerning access must be reasonable and "viewpoint neutral")(quoting Cornelius v. NAACP Legal Defense & Education Fund, Inc., 473 U.S. 788,806 (1985)).

minorities or that they were associated with them for any purpose. The facts of the complaint do not even indicate if Plaintiffs spoke with the minorities or if the minorities were aware of Plaintiffs' actions.

The two forms of association which are protected under the Untied States Constitution are "intimate association" and "expressive association." *Cummings v. DeKalb County*, 24 F.3d 1349, 1354 (11th Cir. 1994)(quoting *McCabe v. Sharrett*, 12 F.3d 1558, 1562-63 (11th Cir. 1994)). Intimate association relates to those "personal relationships that attend the creation and sustenance of a family...." *McCabe*, 12 F.3d at 1563. Plaintiffs have not alleged any familial relationship with the minorities whose rights they were defending.

Expressive association concerns "the freedom to associate for the purpose of engaging in activities protected by the First Amendment. ..." *McCabe*, 12 F.3d at 1563. Plaintiffs have not alleged that they were associating with the minorities at all, and not for the purpose of expressing their First Amendment rights. Accordingly, I respectfully recommend that Plaintiffs' claims based on freedom of association be dismissed.

c. Freedom of Petition.

Plaintiffs claim that their rights to petition were violated by Defendants because Plaintiffs sought to petition the state actors, the Defendants, to stop segregation and discrimination. Plaintiffs also claimed that Defendants wanted to prevent Plaintiffs from petitioning the state unemployment benefits office. The United States Constitution protects the right to "petition the government for redress of grievances." U.S. Const. amend. I. The "Petition Clause protects people's rights to make their wishes and interests known to government representatives in the legislature, judiciary, and executive branches." Biddulph v. Mortham, 89 F.3d 1491,1496 (11th Cir.

1996)(citations omitted). The type of conduct complained of by Plaintiffs does not involve their right of petition to such government representatives. Regarding the access to the state unemployment office, Plaintiffs have not alleged that they were petitioning that office for a redress of any grievance. Accordingly, Plaintiffs have failed to state a claim under the First Amendment protection for rights of petitioning the government. Thus, I respectfully recommend that the claim under the First Amendment be dismissed as to violation of Plaintiffs' right of petition.

4. Violation of Equal Protection.

The City contended that Plaintiffs have failed to allege a violation of equal protection because Florida's trespass-after-warning statute was enforced uniformly. "A preliminary step in equal protection analysis is to determine whether persons who are similarly situated are subject to disparate treatment." *Rodriguez v. Lamer*, 60 F.3d 745, 749 (11th Cir. 1995)(quoting *Johnson v. Smith*, 696 F.2d 1334, 1336 (11th Cir. 1983)). *See also E&T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987)("Different treatment of dissimilarly situated persons does not violate the Equal Protection Clause."). Although "an isolated event may contravene the equal protection clause if different action is taken against persons similarly situated without showing any rational basis for the disparate treatment," an equal protection claim "requires a showing of purposeful discrimination." *Smith v. State of Georgia*, 684 F.2d 729, 736 (11th Cir. 1982). Plaintiffs have not alleged that others who were similarly situated were treated differently than Plaintiffs. In fact, Plaintiffs' complaint alleged that all persons that the mall owner requested to have "trespassed" were in fact "trespassed" by the police. Thus, Plaintiffs have not shown they were treated any differently than any other person who was

trespassed or than any other person who arguably interfered with the guards' performance of their duties. Accordingly, I respectfully recommend that the motions to dismiss the claims based on violation of equal protection be GRANTED.

C. *Count I - Race-Based Denial of Public Accommodation Under 42 U.S.C. § 1981.*

Title 42 U.S.C. § 1981 provides in relevant part as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (a), (c). Generally, the elements of a claim under 42 U.S.C. § 1981 include: (1) plaintiff is a member of a minority; (2) an intent to discriminate based on race by the defendant; and (3) the discrimination concerned an activity enumerated in the statute. *Baker v. McDonald's Corp.*, 686 F. Supp. 1474, 1481 (S.D. Fla. 1987). STMA contended that Plaintiffs failed to establish that they were discriminated against based on their own race. However, as discussed earlier, courts have allowed non-minorities to recover under 42 U.S.C. § 1981 when they are injured as a result of discriminatory

treatment of minorities.

STMA and Wells Fargo also argued that Plaintiffs failed to allege that they were discriminated against concerning any of the activities enumerated in 42 U.S.C. § 1981. Wells Fargo argued that Plaintiffs failed to sufficiently allege racial animus. Lastly, Acadia and STMA contended that if the Court found them to be state actors, no civil cause of action could be brought against them under 42 U.S.C. § 1981, but must instead be brought under 42 U.S.C. § 1983 pursuant to *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989). The City, as an admitted state actor, also argued under *Jett* that any claim against it must be brought under 42 U.S.C. § 1983.

1. Enumerated Rights.

Plaintiffs sought to recover based on their being "trespassed" from the mall for several months because of their verbal defense of minorities in the mall. Title 42 U.S.C. § 1981 protects the right to "full and equal benefit of the laws," including the right to make contracts equally under the laws and be punished equally. Plaintiffs contend that they were punished in a discriminatory manner and were not treated equally with those who did not defend minorities. Their "trespass" from the mall also affected their ability to contract with merchants in the mall. Accordingly, Plaintiffs' complaint alleges violation of an enumerated activity and STMA 's and Wells Fargo's motions to dismiss on that basis should be DENIED.

2. Racial Animus.

Plaintiffs clearly alleged in their complaint that the actions of the Defendants were motivated by racial animus in that they were "trespassed" for defending the rights of minorities. The animus toward minorities affected Plaintiffs in that they were

punished for defending minorities' rights. Plaintiffs stated in their complaint that the Defendants acted willfully and intentionally against Plaintiffs because they opposed racial discrimination. Accordingly, I find that Plaintiffs clearly alleged racial animus against the Defendants. Thus, Wells Fargo's motion to dismiss on this basis should be DENIED.

3. Claims Against State Actors May Only Be Brought Under 42 U.S.C.§ 1983.

a. The City.

The City contended that claims against it could only be brought under 42 U.S.C. § 1983. "Congress intended that the explicit remedial provisions of § 1983 be controlling in the context of damages actions brought against state actors alleging violation of the rights declared in § 1981." *Jett*, 491 U.S. at 731. The United States Court of Appeals for the Ninth Circuit has held that the Civil Rights Act of 1991 overruled this portion of the *Jett* opinion. *Federation of African American Contractors v. Oakland*, 96 F.3d 1204 (9th Cir. 1996). The United States Court of Appeals for the Eleventh Circuit has not addressed this question. However, "district courts within the Eleventh Circuit...have been unanimous in holding that the *Jett* rule remains unaltered, and a plaintiff may not bring § 1981 and § 1983 claims simultaneously against a municipal defendant." *Villanueva v. Fort Pierce*, 24 F. Supp. 1364, 1367 (S.D. Fla. 1998). Accordingly, I recommend that the City's motion to dismiss the § 1981 claim against it be GRANTED.

b. Acadia, STMA and Wells Fargo.

As to Acadia, STMA and Wells Fargo, as noted above, the conduct of Acadia and Wells Fargo has been sufficiently pled concerning state action to withstand a motion to dismiss. Accordingly, if Acadia

and Wells Fargo are found to be state actors, the claim under 42 U.S.C. § 1981 should be dismissed. However, if they are found not to be state actors, a cause of action under § 1981 could be maintained. Accordingly, I recommend that as to Acadia and Wells Fargo, the motion to dismiss Count I be DENIED and that the claim be allowed as alternative pleading at this stage of the case. Previously in this order, I found that Plaintiffs had failed to sufficiently plead state action as to STMA. Accordingly, the § 1981 claim should not be dismissed against STMA on that basis.

D. Count IV -Conspiracy to Deny Rights Under 42 U.S.C. § 1985(3).

Title 42 U.S.C. § 1985(3) provides in relevant part:

> If two or more persons in any State or Territory conspire...for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws
> ...or if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property , or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

To establish a claim under § 1985(3), a plaintiff must show the following: "(1) a conspiracy, (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the

conspiracy, (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *Childree v. UAP/GA AG Chem, Inc.*, 92 F.3d 1140, 1146-47 (11th Cir. 1996)(citing *Lucero v. Operation Rescue*, 954 F.2d 624,627 (11th Cir. 1992); *see also Park v. Atlanta*, 120 F.3d 1157, 1161 (11th Cir. 1997). The second element of the claim requires a showing of racial or other class-based discriminatory animus. *Childree*, 92 F.3d at 1147.

Acadia, STMA, the City and Wells Fargo argued that Plaintiffs failed to sufficiently allege specific factual predicates for the conspiracy, failed to show racial animus and failed to allege that the Plaintiffs were members of a protected class. Plaintiffs alleged in their complaint that the Defendants met and reached an agreement to injure Plaintiffs. "The existence of a conspiracy may be proven by circumstantial evidence and a plaintiff must simply plead general facts from which a conspiracy can be inferred to withstand a [Fed. R. Civ. P.] 12(b)(6) motion." *Arnold v. Board of Educ. of Escambia County, Alabama*, 880 F.2d 305,317 (11th Cir. 1989)(citing *Quinones v. Szorc*, 771 F.2d 289,291 (7th Cir. 1985)). Plaintiffs have not pleaded even general facts sufficient to support a conspiracy claim. Because Plaintiffs have "failed to proffer admissible proof of such a conspiracy," the conspiracy claim should be dismissed. *Park*, 120 F.3d at 1161. Thus, I recommend that the motion to dismiss the claim against all Defendants under 42 U.S.C. § 1985(3) be GRANTED.

E. Count V- Violation of 42 U.S.C. § 1986.

Title 42 U.S.C. § 1986 provides in relevant part as follows:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured....

Acadia, STMA and Wells Fargo contended that because Plaintiffs failed to establish a conspiracy, the claim under 42 U.S.C. § 1986 necessarily failed. The City contended that even if police were aware of a conspiracy, they were powerless to prevent such conspiracy or to prevent its implementation. Section 1986 "only provides a cause of action in the existence of a § 1985(3) conspiracy...." *Park*, 120 F.3d at 1160. Accordingly, since Plaintiffs failed to sufficiently allege a cause of action under 42 U.S.C. § 1985(3), they cannot recover under 42 U.S.C. § 1986. Thus, I respectfully recommend that the motions to dismiss Count V be GRANTED.

F. Request for Injunctive Relief.

In their complaint, Plaintiffs demanded injunctive relief. However, in a later pleading, Plaintiffs asserted that the rescinding of the "trespass" nullified the need for the "order requested by Plaintiffs from this Court to rescind the banishments." (Docket No.77 at 2). The only order referred to and requested had been Plaintiffs' application for preliminary injunction. (*Id.*). In Plaintiffs' complaint, Plaintiffs did not specify what type of injunctive relief they sought, once the "trespass" has been rescinded.

In *Offner v. Shell's City, Inc.*, 376 F.2d 574 (5th Cir. 1967), the United States Court of Appeals for the Fifth Circuit found that an action to enjoin a restaurant's refusal to serve a customer who ate with blacks was not moot when the restaurant agreed to allow the customer to once again dine in the restaurant. Because there was a long history of the restaurant allowing the customer to dine and then refusing to allow him to dine, the Fifth Circuit found that there was an ongoing controversy and the case should be heard. Contrary to *Offner*, in the instant case, Plaintiffs have not shown such an ongoing controversy and the claim for injunctive relief should be dismissed as moot. Therefore, I respectfully recommend that the motions to dismiss Plaintiffs' claims for injunctive relief be GRANTED.

V. CONCLUSION.

Based on the foregoing, I respectfully recommend the following: (1) that the motion to dismiss Count I be GRANTED as to the City; (2) that the motion to dismiss Count II be GRANTED as to STMA; (3) that the motions to dismiss Count II be GRANTED as to Acadia, the City and Wells Fargo on Plaintiffs' claims of freedom of association and right to petition; (4) that the motions to dismiss Count III be GRANTED as to Acadia, STMA, the City and Wells Fargo; (5) that the motions to dismiss Counts IV and V be GRANTED as to Acadia, STMA, Wells Fargo and the City; (6) that the motions to dismiss Plaintiffs' claims for injunctive relief GRANTED; and (7) that the motions to dismiss be DENIED in all other respects.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended in Orlando, Florida this 15th of May, 2000.

KARLA R. SPAULDING
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Presiding District Judge
Counsel of Record
Unrepresented Parties

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-12909-JJ

HELEN EDWARDS,
CHRISTOPHER EDWARDS

Plaintiffs-Appellants,

versus

ACADIA REALTY TRUST, INC.,
WELLS FARGO GUARD SERVICE, INC. OF FLORIDA,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: WILSON, HILL AND FAY, Circuit Judges.

PER CURIAM:
The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.
ENTERED FOR THE COURT:

/s/ James C. Hill
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HELEN EDWARDS, et al.,

Piaintiffs,

-vs- Case No. 6:99-cv-110-Orl-28KRS

ACADIA REALTY TRUST, INC., et al.,

Defendants.
_____/

ORDER

This cause is before the Court on Plaintiffs' Motion to Alter or Amend Judgment (Doc 225, filed March 23, 2001).

Having considered Plaintiffs' Motion (Doc. 225), Plaintiffs' Memorandum of Law in Support of Their Motion to Alter or Amend Judgment (Doc. 226), Defendant, Acadia Realty Trust, Inc.'s Response to Plaintiff's [sic] Motion to Alter or Amend Judgment and Incorporate Memorandum of Law (Doc. 233), and Defendant Wells Fargo Guard Services, Inc.'s Response in Opposition to Plaintiffs' Motion to Alter or Amend Judgment (Doc. 237), the Court finds no basis to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). There has not been an intervening change in controlling law, no new evidence has become available, and the Court finds "'no need to correct clear error or prevent manifest injustice.'" Coppage v. United States Postal Serv., 129 F. Supp. 2d 1378,1379 (M.D. Ga. 2001) (quoting Sussman v. Salem, Saxon & Nielsen, P.A., 153 F.R.D. 689, 694 (M.D. Fla 1994)).

Accordingly, it is **ORDERED** and **ADJUDGED** that Plaintiffs' Motion to Alter or Amend Judgment (Doc. 225, filed March 23, 2001) is **DENIED.**

DONE and **ORDERED** in Chambers, Orlando, Florida this 17 [sic] day of April, 2001.

JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1254(1) provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree....

28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343 provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> **(1)** To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> **(2)** To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
>
> **(3)** To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> **(4)** To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1981 provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and

Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

(3)

No. 01-1886

IN THE

Supreme Court of the United States

HELEN EDWARDS and CHRISTOPHER EDWARDS,

Petitioners,

v.

ACADIA REALTY TRUST, INC. and WELLS FARGO GUARD SERVICES, INC. OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT WELLS FARGO GUARD SERVICES, INC. OF FLORIDA

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QUESTION PRESENTED

Whether the decision of the Court of Appeals for the Eleventh Circuit followed the decisions of this Court and was consistent with decisions of other Courts of Appeals when it ruled that the record evidence supported the trial court's entry of summary judgment in favor of Wells Fargo and against Helen and Christopher Edwards on their claim for race discrimination under 42 U.S.C. § 1981, and on their claim under 42 U.S.C. § 1983 for violation of their constitutional right to free speech.

CORPORATE DISCLOSURE STATEMENT

The Respondent herein, Wells Fargo Guard Services, Inc. of Florida was acquired by Burns International Security Services, Inc. of Florida, which was then acquired by Pinkerton's, Inc., a wholly owned subsidiary of Securitas AB, a company listed on the Stockholm Stock Exchange.

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STATEMENT OF THE CASE

Petitioners, Helen and Christopher Edwards (the "Edwards" or "Petitioners") attempted to make a claim for civil rights violations based on their ejection from a privately owned and operated shopping center by a security guard employed by a private security company. Various claims for conspiracy to violate civil rights, and for violation of the right to petition and free association were dismissed by the United States District Court for the Middle District of Florida for failure to state a claim on which relief could be granted. After adequate time for discovery had passed, final summary judgment was entered in favor of Wells Fargo Guard Services, Inc. of Florida ("Wells Fargo") and co-Respondent Acadia Realty Trust, Inc. ("Acadia") on the Edwards' claims for intentional race discrimination under 42 U.S.C. § 1981 and for violation of the freedom of speech under 42 U.S.C. § 1983. The Edwards now appeal the Eleventh Circuit's affirmance of entry of final summary judgment and the order of dismissal by the trial court.

FACTS MATERIAL TO THE QUESTION PRESENTED

Searstown Mall (the "Mall") is a shopping center located in Titusville, Florida. (R,V4,101, ¶ 2)[1] It is privately owned and operated by an entity known as Searstown Mall Association, and formerly by a separate entity known as Acadia Realty Trust. (R,V5,141, pp.12 and 22-3) At all times

1. References to the Record of the Eleventh Circuit are indicated by "R" and include the volume number, document number, and page or paragraph number. References to materials included in the Appendix to Petition for Writ of Certiorari are indicated by "A."

material, Wells Fargo, a private security company, was hired to provide security guard services at the Mall. (R,V5, 141, pp. 46-47) At all times material, Wells Fargo maintained an anti-discrimination policy specifically prohibiting discrimination on the basis of race. (R,V4, 116, pp. 44-46) Wells Fargo provides education regarding the anti-discrimination policy to new employees at the time of hire, as well as periodic additional training to its security officers. (R,V4, 116, pp. 44-45; and V5, 141, p. 55)

Pursuant to the contract for services between Wells Fargo and the Mall, security guards assigned to Searstown Mall were directed to patrol the Mall and to enforce the posted rules of the Mall. (R,V5, 141, pp. 46-47, 83-84) One of the security guards employed by Wells Fargo and assigned to work at the Mall was Andrew Bankowski. (R,V4, 116, p. 35) Mr. Bankowski was familiar with, understood and followed Wells Fargo's anti-discrimination policy. (R,V4, 114, p. 46) While working at the Mall, Mr. Bankowski reported to Mall manager Deborah Hardy. (R,V4, 116, p. 35; V5, 141, pp. 10, 75-76, 83-85) Ms. Hardy remained continuously employed by the old owners of the Mall, Acadia Realty, and the new Mall owners, Searstown Mall Association. (R,V5, 141, pp. 12 and 26) The Mall has an anti-discrimination policy. (R,V4, 116, p. 51)

The Mall has written Rules and Regulations enforced by security guards. (R,V4, 120, pp. 23-24) Children were routinely escorted out of the Mall by security guards for the legitimate and non-discriminatory reasons of "safety and security". (R,V4, 116, pp. 23-24) The policy is racially neutral. (R,V4, 116, p. 22) Wells Fargo security officers assigned to the Searstown Mall enforced this racially neutral policy by questioning minors as to whether or not they were

accompanied by an adult, and by escorting unaccompanied minors to a designated location so that they could be picked up by their parents. (R, V4, 116, pp. 23-4)

On November 20, 1998, Helen and Christopher Edwards visited the Mall with their children. (R,V4, 108, p. 32) Helen Edwards is of American Indian and Irish ancestry. (R,V4, 112, p. 22) Christopher Edwards is Caucasian. On that night, Mr. Bankowski was providing guard services at the Mall. (R,V4, 116, p. 6) As part of his duties, Mr. Bankowski had actual or implied authority from the Mall owners to direct individuals to leave the premises. (R,V4, 161, p. 36; R,V5, 141, p. 51-52)

The Edwards observed unaccompanied minors being disruptive in the Mall. (R,V4, 112, pp. 190-192) A group of Caucasian minors asked the Edwards for some change. (R,V4, 112, p. 105, p. 59-60) Soliciting money is a violation of the Mall's written policies. (R,V4, 116, p. 44 and V5, 141, p. 251) The Edwards did not make any complaint about the behavior of the group of Caucasian minors. (R,V4, 112, p. 159) During the evening, Helen and Christopher Edwards had occasion to observe Mr. Bankowski interact with unaccompanied minors and in a "straightforward" tone of voice, ask what they were doing. (R, V4, 108, pp. 54-55; and V4, 112, p. 168) Mr. Edwards believes he observed this activity for approximately 10 to 15 minutes. (R,V4, 108, p. 65) Mrs. Edwards believes it was 25-30 minutes. (R,V4, 111, pp. 44, 54, 104) Petitioners did not observe a security guard approach the white children who were soliciting for money. (R,V4, 111, pp. 107 and 159) Mrs. Edwards admitted that the security guard may have escorted these white children out of the Mall that evening, however, she was not there to witness it. (R,V4, 112, pp. 107 and 160)

Also at the Mall that evening was Dr. Juan Perez. (R, V4, 122, p. 16) Dr. Perez is Hispanic. (R, V4, 122, p. 9) Dr. Perez was at the Mall for approximately 5-10 minutes that evening. (R,V4, 122, p. 62) He had occasion to see "some children, some teenagers", "some whites, [and] some blacks" at the Mall that evening. "Some of the children were loud. Some were more loud than others." (R,V4, 122, p. 59) Dr. Perez had occasion to witness a security guard tell a group of African American children he wanted "them to wait outside" the Mall. (R, V4, 122, p. 29) Dr. Perez did not have the opportunity to observe the security guards ask any other children to leave the Mall that evening. (R, V4, 122, p. 64)

At some point during the evening, Mrs. Edwards had a verbal disagreement with the security guard, Andrew Bankowski, while she was inside the Mall with her husband. (R,V4, 161, p. 8) As a result, Mr. Bankowski called the Titusville Police Department and requested that a trespass warning be issued to the Edwards because they were interfering with his duties as a security guard and yelling at him. (R,V4, 116, pp. 6, 10 and 14-15; V4, 126, Attachment 6; V5, 140, ¶ 5; and V5, 116, p. 21) The Edwards were never charged with any crime, and do not contend that they were arrested or held against their will. (R,V4, 111, pp. 78-9; V4, 109, pp. 125-7) The Edwards contend that they were wrongfully ejected and banished from the Mall. (R,V3, 57, ¶ 11)

Mrs. Edwards had visited the Searstown Mall on numerous occasions prior to November 20, 1998 and never had a problem with the security guards. (R, V4, 112, pp. 186 and 189) Mr. and Mrs. Edwards are not aware of the Searstown Mall ever discriminating against minorities or people who speak out on behalf of minorities prior to

November 20, 1998. (R,V4, 112, p. 127; V4, 109, pp. 208-9) Debora Hardy was unaware of any prior complaint of racial discrimination, racial harassment or related retaliation prior to the incident involving the Edwards at the Mall. (R,V5, 141, p. 57) Ms. Hardy had no prior complaints about Andrew Bankowski before the incident involving the Edwards, in fact, she sent a letter of appreciation to Wells Fargo because she was happy with his performance. (R,V5, 141, p. 78)

The trespass warning issued to the Edwards was maintained on the Mall premises by Ms. Hardy. (R,V5, 141, pp. 32, 51-52, and 79; and V4, 116, p. 36) Thereafter, the Edwards requested that the Mall management rescind the trespass warning so that they could be allowed to reenter the Mall. (R,V5, 141, pp. 8, 10, and 20-21) The Mall granted the Edwards' request, and the trespass warning was rescinded. (R,V5, 141, p. 7; V4, 101, ¶ 31)

The Edwards had occasion to return to the Searstown Mall with their children after the trespass warning was rescinded. (R,V4, 111, p. 30) While the Edwards were eating at a restaurant, their children were wandering unaccompanied throughout the Mall. (R,V4, 112, pp. 150 and 158-59) The Edwards unaccompanied children were asked by Mall security officers to "get back to where they belonged." (R,V4, 111, p. 30)

Helen Edwards has no knowledge of any conspiracy involving the Mall management. (R, V4, 112, p. 215) No one at the Mall ever asked Andrew Bankowski to treat patrons differently based on their race or color. (R,V4, 116, p. 54) The Titusville Police Department does not have any arrangements with the Searstown Mall or its security guards

regarding the trespass of individuals from the Mall. (R,V4, 126, Attachment 7, ¶ 6; V5, 140, ¶ 6; V5, 141, p. 76; and V4, 116, p. 32)

REASONS FOR DENYING THE WRIT

The Edwards' Petition for a Writ of Certiorari should be denied because the decision of the Eleventh Circuit Court of Appeals issued below is consistent with prior opinions of this Court and other U.S. Courts of Appeal decisions raising similar issues. The decisions below properly applied existing precedent to the facts presented.

A. THE DECISION APPEALED DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR OTHER COURTS OF APPEAL

In the decision appealed, the Eleventh Circuit succinctly found "no reversible error" and affirmed the orders of the district court. (A-2) In the seventeen pages of argument presented by Petitioners, they fail to set forth a single decision of any court in direct conflict with this decision. This is not unexpected as the decision of the Eleventh Circuit does not cite any cases, but rather is a per curium affirmance based on review of the record presented.

Petitioners argument is a thinly veiled attempt to disguise their true complaint that the district court misapplied existing law to the facts Petitioners presented. In an attempt to display some conflict in law, Petitioners provide lengthy string cites. However, no pure conflict is ever established. Simply put, no such conflict exists.

B. THE COURTS BELOW PROPERLY APPLIED EXISTING PRECEDENT TO THE FACTS PRESENTED

The district court essentially determined that Petitioners did not suffer any deprivation of constitutionally guaranteed rights on November 20, 1998. The facts presented established that (1) Wells Fargo did not act as an arm of the state in removing the Edwards from Searstown Mall on November 20, 1998; and (2) Wells Fargo does not maintain a custom or policy of discriminating on the basis of race or taking action against those who oppose racial discrimination.

Petitioners did not come forward with evidence which a reasonable jury could consider and conclude that they suffered from intentional race-based discrimination. In removing the Edwards from private property, Wells Fargo enforced a racially neutral policy in a nondiscriminatory manner. Accordingly, judgment was properly entered against Petitioners on their claim brought pursuant to 42 U.S.C. § 1981.

Petitioners claims under 42 U.S.C. § 1983 failed because Petitioners failed to establish Wells Fargo was acting as an arm of the state when Petitioners were evicted from the Mall. *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992).

All of the Petitioners' remaining claims were properly dismissed. Petitioners failed to allege that they were associating with minorities, a required element of alleging a claim for violation of their freedom of association. Petitioners claim for violation of equal protection rights was properly dismissed because they failed to allege that they were treated differently than any other individual who was trespassed from

the Mall for interfering in the security guards' duties. Petitioners failed to plead even the most basic factual scenario to sustain a clause of action against private parties claimed to be conspiring to commit purposeful discrimination on the basis of race. Accordingly, not only were Petitioners' remaining causes of action properly dismissed, but further leave to amend was properly denied.

The Edwards presented no evidence of anyone ever complaining about race based discrimination, whether to the Mall, the security guard company or even to the security officer himself. There was no evidence regarding any prior complaints of restricted free speech. The Edwards presented no evidence of prior constitutional violations or false arrests involving Florida's trespass after warning statute. Nonetheless, the Edwards asks this court to presume the offending custom or policy based on the 10 to 30 minutes the Edwards spent in the Mall on November 20, 1998.

The Edwards have submitted no proof as to a policy or custom of Wells Fargo to discriminate on the basis of race. Instead, the Edwards point to the actions of a single security guard and asked the court to infer a corporate-wide policy. The Edwards missed a crucial link. The trial court could not look at the actions of Bankowski alone and then infer a constitutional tort without evidence that the employee acted pursuant to a company policy or custom because then

> Liability for the independent actions of a[n . . .] employee would be based upon respondeat superior and thus not actionable against the [company] under § 1983.

Ancata v. Prison Health Services, Inc., 769 F.2d 700, 705, n.8 (11th Cir. 1985). *See also Arnold v. Board of Educ. of Escambia County Ala.*, 880 F.2d 305, 310 (11th Cir. 1989)

("The theory of respondeat superior is insufficient to impose liability on [local governmental body]." Citing *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978).

Petitioners suggest that the public policy considerations of requiring Petitioners show custom and policy before holding a public entity liable should be dispensed when a state role is taken over by a private corporation. Petitioners fail to explain what state role Wells Fargo took over when it entered into a contract with a private property owner to maintain secure private premises. *See Sanders v. Sears, Roebuck & Co.*, 984 F.2d 972 (8th Cir. 1993). Certainly, private security officers on private property are not state actors and have never been considered as such. *See Wade v. Byles*, 83 F.3d 902, 906 (7th Cir. 1996) (lobby security guard was not traditionally an exclusive state function, and thus guard was not state actor for purposes of § 1983 action).

Petitioners rely heavily on *Richardson v. McKnight*, 117 S. Ct. 2100 (1997), in support of their public policy argument for overturning *Harvey*. However, Petitioners fail to cite this Court to the description in *Richardson* with application to this particular appeal: "The case does not involve a private individual briefly associated with a government body." *Id.* at 2108. Petitioners' claims against Wells Fargo do not even meet *that* standard and the reasoning of *Richardson* does not apply.

In sum, the Edwards did not present any evidence from which a jury could find that the existence of a corporate policy or custom caused or was the moving force behind the violation of the Edwards' constitutional rights. *See Gold v. City of Miami*, 151 F.3d 1346 (11th Cir. 1998) (judgment as a matter of law properly entered for city based on lack of evidence of motivating policy or custom).

Petitioners cite *City of Canton, Ohio v. Harris*, 489 U.S. 378, 380 (1989), for the proposition that "a single or initial incident can provide evidence of a custom or policy, particularly if the Appellee is negligent about training and/or supervising to prevent the violation of rights." (Petition, p. 18) This Court has already recognized the narrowness with which the hypothetical single incident situation described in *City of Canton* should be read: To establish a "deliberate or conscious choice" or such "deliberate indifference," a plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action. *See Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397 (1997).

Under this precedent, Petitioners would still be required to establish that Wells Fargo, (1) was acting as an arm of the government; and (2) was on notice of a need to train or supervise in a particular area. Petitioners failed to present proof as to either requirement.

In reality, Petitioners seek to impermissibly inflate a single incident into establishing an offending company-wide custom and policy of a private corporation. This is little more than an veiled attempt to resuscitate their argument for *respondent superior* liability. Further, the Edwards point to no evidence that Wells Fargo is negligent in training its employees to prevent violation of civil rights.

CONCLUSION

Respondent Wells Fargo Guard Services, Inc., of Florida respectfully requests this honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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(4)

No. 01-1886

IN THE

Supreme Court of the United States

HELEN EDWARDS and CHRISTOPHER EDWARDS,

Petitioners,

v.

ACADIA REALTY TRUST, INC. and WELLS FARGO GUARD SERVICES, INC. OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ACADIA REALTY TRUST, INC.

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

In addition to the parties listed by Petitioners, two additional parties warrant mention. Searstown Mall Association, Inc. and the City of Titusville, Florida were defendants in the proceeding below. The claims against Searstown Mall and the City of Titusville were settled and, as such, the Petition does not raise any issue with respect to those parties.

Acadia Realty Trust, Inc. is a fully integrated, self-managed and self-administered equity REIT focused on the ownership, acquisition, redevelopment and management of neighborhood and community shopping centers. To the best of our knowledge, there is no publicly-held company that owns ten percent (10%) or more of Acadia Realty Trust, Inc.'s stock.

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STATEMENT OF THE CASE

This Petition was filed in an attempt by Petitioners to radically alter the present, long-standing precedent underlying 42 U.S.C. §§ 1981 and 1983 claims in an effort to elevate the rights of non-minorities over minorities who suffer direct discrimination. Petitioners argue that a "good faith belief" of racial discrimination, rather than proof of intentional discrimination, is the only proof that should be required to prevail on the merits of a § 1981 claim. Further, Petitioners seek to have this Court eliminate the requirement of establishing a policy and custom of discrimination by private employers in a § 1983 claim.

Neither the Eleventh Circuit's ruling, nor the record below, support such a radical change in the law. The ruling is not in conflict with this Court's opinions or the opinions of other Circuit Courts in addressing racial discrimination claims under §§ 1981 and 1983. As such, the Petition should be denied.

STATEMENT OF THE FACTS

Searstown Mall is a shopping center located in Titusville, Florida. It is privately owned and operated currently by an entity known as Searstown Mall Association, and formerly by a separate entity known as Acadia. (R4-114-12, 22-23). At all times material, Wells Fargo, a private security company was hired to provide security guard services at the Mall. (R4-114-47). Wells Fargo and all security guards employed therein, were not employees of Acadia but were merely independent contractors. The security guards were directed to patrol the Mall and to enforce the posted rules of the Mall. (R4-114-47). One of the security guards employed by Wells

Fargo and assigned to work at the Mall was Andrew Bankowski. (R4-116-35). The Mall manager at all times relevant was Ms. Deborah Hardy. Ms. Hardy has successfully been employed by Acadia Realty and Searstown Mall Association. (R4-114-12.26).

The State of Florida leased space at the Mall and established an employment office. (R5-141). The Mall had no special relationship with the employment office that was different than any other tenant at the Mall. (R5-141). The security officers at the Mall had no special relationship with the employment office that was different than any other tenant of the Mall. (R4-116).

On November 20, 1998, Helen and Christopher Edwards visited the Mall with their two sons and a friend of their sons. (R4-108-32). On that night, Mr. Bankowski was providing security guard services at the Mall. (R4-116-6). While the boys saw a movie, Mr. and Mrs. Edwards ate dinner at a Mall restaurant. (R4-111-41) During their dinner, they had occasion to observe a group of young black girls eating in the restaurant. Petitioners described the girls as well-behaved. These children were not accompanied by an adult. After dinner, Petitioners browsed the Mall and then proceeded to sit on a bench near the movie theater to wait for their sons to exit. (R4-111-43-44). While waiting on a bench inside the Mall for their sons to exit the movie theatre, they observed unaccompanied minors being disruptive in the Mall. (R4-112). A group of Caucasian minors asked the Petitioners for some change, which was a violation of Mall policy. (R4-112). Petitioners did not make any complaint about the behavior of the group of Caucasian children. (R4-112). Petitioners did not observe a security guard

approach the white children and admitted that the security guard may have escorted these children out of the Mall that evening, but may not have witnessed it. (R4-111-112).

Later, Petitioners observed Mr. Bankowski and another Wells Fargo security guard interacting with a group of young black girls (R4-111-53, 54). As the guards approached the girls, one of the guards asked the girls "what their business was" in an authoritative voice. (R4-111-55, 56). The girls told the guards that they were waiting inside for their parents to pick them up. (R4-11-56). According to Petitioners, Mr. Bankowski replied that he did not care and that the girls needed to get their "black asses out of there." (R4-111-56; R4-112-151). The girls then left the Mall. (R4-111-57).

Thereafter, Petitioners sat on the bench for about ten to fifteen minutes to wait for their sons. (R4-111-76,77). During this time, Petitioners had an opportunity observe the security guards approach another group of children, this time an unaccompanied group of black boys. (R4-111-46). Again, the guards asked the boys what they were doing with a reply that they were there to see a movie. (R4-111-47). The guards told them that they "needed to get there." (R4-111-47). At that time, Mrs. Edwards did not feel that the boys were treated unfairly. (R4-111-48). Mr. Bankowski explained that it was better from a security standpoint for the children to be in well-lighted areas outside where the security guards can keep an eye on them. (R4-116-23). Additionally, parents picking their children up do not want to have to go inside the Mall to pick up their children. (R4-116-23, 24).

Helen Edwards assumed that Mr. Bankowski was forcing the girls to leave the Mall because the girls were black. (R4-111-55, 56). As such, while Mr. Bankowski was in the

process of escorting the young black girls from the Mall, a verbal confrontation ensued between Mrs. Edwards and Mr. Bankowski (R4-111-63, 64; R4-116-7-11). Mrs. Edwards asked if there was a problem with the black girls and when Mr. Bankowski tried to explain, she would not listen. (R4-111-64, 66). Mrs. Edwards acknowledged that she did not give him a chance to explain his actions. (R4-111-66). As a result of this confrontation, Mr. Bankowski telephoned the Titusville Police Department, requesting the issuance of a trespass warning against an adult couple sitting on the benches inside near the movie theatres. (R4-116-6, 12; R). In response to Mr. Bankowski's call, Titusville police officers were dispatched to the Mall. The Titusville police officers were met by Mr. Bankowski upon their arrival and were told to issue trespass warnings against Mrs. Edwards who was in the process of exiting the Mall. (R4-116-14). Upon questioning as to the issuance of the trespass warning, Mr. Bankowski informed the Titusville police officers that Mrs. Edwards had been interfering with his duties as a security guard by yelling at him. (R4-116-14, 15).

The police officers then performed their own investigation by speaking with Petitioners. After doing so, a trespass warning was issued to Mrs. Edwards, not Mr. Edwards. This trespass warning was maintained on the Mall premises by Debra Hardy. (R4-114-51, 52, 79). Mrs. Hardy was not present when Mr. Bankowski contacted the Titusville police officers nor during the confrontation between Mr. Bankowski and the Petitioners. (R4-114).

Mrs. Hardy admits she was not in a position to know what happened between Mr. Bankowski and the Petitioners resulting in the issuance of the trespass warning. (R4-114). Mrs. Hardy's only knowledge of the incident was from the

written trespass warning which stated that Mrs. Edwards were trespassed from the Mall based on a verbal confrontation with a Wells Fargo security guard, Mr. Bankowski. (R4-114-21). As such, Mrs. Hardy believed that Mr. Bankowski had the legal right to exclude her from the Mall for interfering with his duties as a security officer. (R4-114-21). After the trespass warning was issued to Mrs. Edwards, the Petitioners requested that Mall management rescind the trespass warning so that they could be allowed to enter the Mall. (R4-114-10, 20-21). The Mall granted the Edwards' request and the trespass warning was rescinded. (R4-114-7).

Pursuant to the Titusville police department's practice, a police officer has the discretion to refuse to document a trespass warning if the police officer believes that the request has an unlawful basis. If there are any questions regarding the appropriate action to take, the police officer is supposed to contact supervisory personnel. The officers did not believe that Mr. Bankowski had an unlawful basis for requesting that Mrs. Edwards be given a trespass warning, and, therefore did not contact supervisory personnel. (R4-118-7).

Mrs. Edwards testified that neither she nor her family had any other encounter with the Mall security before November 20, 1998 except on one occasion following the incident. (R4-112-189, 193-195). According to Mrs. Edwards, her sons and nephew were walking through the Mall when security approached the unaccompanied children and told them to get back with their parents. (R4-112-193-195). Mrs. Edwards testified that she did not believe the guards knew her sons or that they were motivated by skin color on this occasion. (R4-112-193-195).

Respondent does not have a policy, practice, or custom of discriminating against minorities in places of public accommodation or elsewhere. Likewise, Respondent does not have a policy, practice, or custom or discriminating against non-minorities who accompany or speak out in opposition to discrimination against minorities. (R4-112-223). Rather, the Mall policy was that all children needed to be accompanied by an adult and, if not, would be escorted from the Mall.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit's Ruling Does Not Conflict With Other Circuit Court Decisions Of Racial Discrimination In Places Of Public Accommodation

It is apparent that Petitioners want this Court to grant certiorari because they believe that their own *perception* that several black children were being treated differently than white children is sufficient to establish a claim under § 1981. This argument is clearly erroneous.

Section 1981 prohibits *purposeful discrimination* on the basis of race. *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 391 (1982). To recover, a claimant must show that (1) they are members of a racial minority; (2) the defendant *intentionally* discriminated on the basis of race; and (3) the discrimination concerned a right enumerated in the statute. *Id.* Intentional race-based discrimination is essential to recovery under § 1981. *Brown v. American Honda Motor Company, Inc.*, 939 F.2d 946 (11th Cir. 1991); *Smith v. Dallas County Board of Education*, 480 F. Supp. 1324 (S.D. Ala. 1979). Mere speculation, "belief" or presumptions is not sufficient to

establish direct evidence of discrimination. *Jones v. Winn-Dixie Stores, Inc.*, 75 F. Supp. 2d 1357, 1362 (S.D. Fla. 1999). In fact, the Eleventh Circuit has recognized that "the mere utterance of an ethnic or racial epithet which engenders offensive feelings" does not in and of itself prove intentional discrimination as required under § 1981. *See Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

The long-standing precedent of racial discrimination claims in places of accommodation, including claims of retaliation, demonstrate the need of establishing intentional discrimination under § 1981. *See Jackson v. Tyler's Dad's Place, Inc.*, 850 F. Supp. 53, 55 (D.D.C. 1994) (citing *Bray v. RHT, Inc.*, 748 F. Supp. 3, 5 (D.D.C. 1990) (wherein summary judgment was granted in favor of a restaurant because plaintiffs failed to allege any facts supporting their charge that they were denied seating in the main dining room because of their race); *See also White v. Denney's, Inc.*, 918 F. Supp. 1418, 1423-1424 (D. Colo. 1996) (wherein the court granted summary judgment against four African-American women because of their complete failure to show that they were treated differently than other similarly situated people in the restaurant).

Although Respondent would agree with Petitioners that § 1981 claims apply the same prima facie standards as those claims brought pursuant to Title VII, Respondent disagrees that a party must prove only a "good faith belief" that the alleged discrimination existed under § 1981. Such a premise completely disregards established law that requires proof of intentional discrimination under § 1981. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 949 (11th Cir. 1991). Rather, to establish a prima facie case under § 1981, outside of the employment context, a claimant must prove each of the following elements:

(1) That they are members of a protected class;

(2) That they attempted to afford themselves the full benefits and enjoyment of a public accommodation;

(3) That they were denied those benefits and enjoyment; and

(4) That similarly situated persons who are not members of the protected class received the full benefits or enjoyment or were treated better.

Laroche v. Denny's, Inc., 62 F. Supp.2d 1366, 1370 (S.D. Fla. 1999). Once the prima facie case is established, the burden shifts to the defendant to come forward with evidence of a legitimate, nondiscriminatory reason for its conduct. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 949 (11th Cir. 1991).

Based upon the undisputed material facts presented in the instant case, the Eleventh Circuit was correct in affirming the order of the District Court. Most importantly, there is no evidence that Petitioners were trespassed from the Mall based upon any discriminatory motive on the part of Respondent. Petitioners merely speculated that they were trespassed because of their opposition to what they perceived to be race-based discrimination. The law is clear, however, that suspicion, perception, opinion and belief cannot be used to defeat a motion for summary judgment. *Local No. 48, United Bhd. of Carpenters & Joiners v. United Bhd. of Carpenters & Joiners*, 920 F.2d 1047 (1st Cir. 1990).

Likewise, Petitioners failed to prove that similarly situated white individuals in the Mall were treated more favorably. Petitioners attempt to do so by claiming that other white children in the Mall were treated differently than the black girls. The sum of Petitioners' evidence presented on this point is that the white children were misbehaving and they did not witness any white children being ejected by mall security. Despite this, Mrs. Edwards admitted that they didn't observe the security guards except during the 10 - 15 minutes that they sat on the bench, nor do they know if other white children were confronted or escorted out of the Mall by security at any other point in the evening. As such, the Eleventh Circuit was correct in its analysis that the Petitioners cannot seek greater protection under the laws than those of minorities themselves.

Even if Petitioners were to establish a genuine issue of material fact on their prima facie case, their claims still fail as Respondent demonstrated legitimate, non-discriminatory reasons for Mr. Bankowski's actions of escorting the children from the mall. Mr. Bankowski testified that it was his practice to escort children out of the mall on weekends, not because of race, but for the safety and security of the people. Given that Petitioners failed to produce even a scintilla of evidence to dispute these reasons, summary judgment in favor of Respondent was warranted.

II. The Eleventh Circuit's Ruling Did Not Address, Let Alone Conflict, With This Court Or Other Circuit Court Opinions Regarding Petitioner's Standing To Bring A Claim Under 42 U.S.C. § 1981

Nothing in the record below supports Petitioners' assertion that the Eleventh Circuit relied upon *Little v. United Technologies*, 103 F.3d 956 (11th Cir. 1997) in reaching its decision. Rather, the Eleventh Circuit's order clearly states that it relied upon argument counsel and the orders of the District Court in reaching its opinion. The record actually reveals that although Respondents argued Petitioners lacked standing to bring their claims, the District Court disagreed, concluding Petitioners had standing to bring their claim of retaliation for opposing racial discrimination based upon the long-established holdings of this Court and of other Circuits that addressed the issue, citing to *Gordon v. City of Cartersville*, 522 F. Supp. 753, 756 (N.D. Ga. 1981); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (non-minority had standing to bring claim against subdivision that expelled non-minority for advocating the right of a black to lease the non-minority's house); *Faraca v. Clements*, 506 F.2d 956 (5th Cir. 1975) (non-minority had standing to bring suit when non-minority was refused employment because non-minority was marred to a black person); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306 (2d Cir. 1975) (non-minority had standing to bring action against former employer who terminated him for selling non-minority's home to black); *Adler v. Columbia Historical Society*, 690 F. Supp. 9 (D.D.C. 1988); *Riccobono v. Whitpain*, 497 F. Supp. 1364 (E.D. Pa. 1980).

Further, the Eleventh Circuit's opinion in *Little v. United Technologies*, 103 F.3d 956 (11th Cir. 1997) should not be

used as a basis for granting the petition as it is limited to the facts and circumstances of that case. *Little* clearly stands for the proposition that retaliation claims brought pursuant to Title VII and § 1981 are different. Respondent further acknowledges that *Little* can be read to prohibit suits under § 1981 where the retaliation alleged is not based on the race of the complainant. However, prior to the discussion of the validity of Plaintiff's § 1981 claim in *Little*, the Eleventh Circuit analyzed at length Plaintiff's failure to show that he had engaged in statutorily protected conduct that would give rise to a retaliation claim under Title VII. Therefore, *Little* does not stand for the proposition asserted by Petitioners that a white claimant alleging retaliation for opposing discrimination never has standing to bring a claim under § 1981. In fact, in the same year *Little* was decided, the Eleventh Circuit again addressed the issue and recognized the ability of white claimants to bring claims of retaliation for discrimination under § 1981. *See Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997) (where white employees allegedly were retaliated against for complaining of discrimination against black employees, white plaintiffs had standing to proceed under § 1981). Thus, the petition should be denied on those grounds.

III. Certiorari Should Be Denied Because The Eleventh Circuit's Holding Follows The Long-Established Rulings Of This Court Requiring Proof of A Policy And Custom

This Court has placed strict limitations on municipal liability under § 1983. *See Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 691 (1978). The Eleventh Circuit, following this Court's long-established precedent in this regard, has held that a defendant cannot be

liable under § 1983 on a *respondeat superior* or vicarious liability basis. *Harvey v. Harvey*, 949 F.2d 1127, 1129 (11th Cir. 1992). Other Circuits have followed suit, including the Eighth Circuit in *Sanders v. Sears Roebuck & Co.*, 984 F.2d 972 (8th Cir. 1992) (wherein the court held that Sears could not be held liable under § 1983 on a *respondeat superior* theory even though the security guard was employed by Sears). *Id.*; *See also Scutieri v. Estate of Philip Revitz*, 683 F. Supp. 795 (S.D. Fla. 1988) (holding that as a matter of law, a private corporation cannot be liable strictly on the basis of *respondeat superior* theory under § 1983).

Despite the well-established precedent, not only in the Eleventh Circuit, but in most other Circuits, the Petitioners argue for the reversal of existing law (i.e., private corporate liability under *respondeat superior*) based on this Court's holding in *Richardson v. McKnight*, 521 U.S. 399 (1997). In *Richardson*, this Court merely decided the very narrow issue of whether employees of a private prison management firm are entitled to a qualified immunity from suit by prisoners charging a violation of 42 U.S.C. § 1983. However, this Court stated that the holding of *Richardson* was limited to the context in which a "private firm, systematically organized to assume a major, lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms." *Richardson* 521 U.S. at 412. Thus, the focus of this Court was strictly related to the issue of quality immunity, not liability. *Id.*

First and foremost, qualified immunity generally provides government officials with a shield from suit to avoid the expense and disruption of going to trial and is not a liability issue. *See Ansley v. Heinrich*, 925 F.2d 1339, 1345

(11th Cir. 1991). The *respondeat superior* and/or vicarious liability doctrine, on the other hand, is a question of liability and the mechanisms of holding a corporation liable for the acts of its agent and/or employee. Thus, it addresses the merits of a cause of action, not the entitlement to bring suit. These distinct differences were not addressed by this Court in *Richardson* and as such, the doctrines as set forth therein are not applicable in the instant case.

Moreover, the concerns in *Richardson* do not appear to be particularly relevant in the instant case. In *Richardson*, the private entity faced competitive pressures from other firms which would cause it to make sure that its guards were acting appropriately. *Richardson*, 521 U.S. 399 (1997). In other words, the employees who allegedly violated rights were performing tasks pursuant to the entity's fulfillment of an administrative task as a contractor with the state. In this case, however, we are dealing with a privately-owned Mall and the issuance of trespass warnings for behavior which interfered with private security guard duties. There is no contract with the state to perform any types of tasks nor to perform any functions which are traditionally those of the state (i.e., management of prisons). Here, Respondent is not competing with any other firm for government contracts. In other words, Respondent does not have the same competitive pressures that were identified in *Richardson* because (1) it is not competing for government contracts, and (2) the individual Defendants were performing tasks incidental to the entity's main purpose of providing services to customers in the form of retail stores for shopping. Therefore, the different factual posture of the instant case from *Richardson* leads to the conclusion that the need for a change and/or reversal of existing precedent as it relates to the *respondeat superior* doctrine in this context is not

warranted. Thus, because the policy concerns which prompted this Court in *Richardson* to preclude qualified immunity for private parties performing traditional functions of the state, are not applicable to the unique factual circumstances presented by this case, the petition should not be granted.

IV. Certiorari Should Be Denied Because Petitioners Failed To Adduce Evidence Of A Policy Or Custom Of Respondent To Discriminate On The Basis Of Race

Petitioners purport to allege that Respondent violated their right of free speech as guaranteed by the United States Constitution. They assert these violations in accordance with the 42 U.S.C. § 1983 which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

42 U.S.C. § 1983. To recover under § 1983, a plaintiff must establish that a defendant's act or omission, *done under color of state law*, deprived the plaintiff of a right, privilege, or immunity protected by the Constitution or the laws of the United States. *See Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992); *Little v. City of North Miami*, 805 F.2d 962, 965 (11th Cir. 1986) (citation omitted); *see also Adickes v.*

S.H. Kress & Co., 398 U.S. 144, 150 (1970). Section 1983 does not create substantive rights; it instead provides remedies for denial of rights protected by the Constitution or other federal law. *Little*, 805 F.2d at 965 (citation omitted).

The First Amendment provides individuals with the right of free speech. However, "the guarantees of the First Amendment have never meant that people who want to [protest] have a constitutional right to do so whenever, however and wherever they please." *Greer v. Spock*, 424 U.S. 828, 836 (1972) (quoting *Adderley v. Florida*, 385 U.S. 39, 48 (1966)). The degree of protection guaranteed by the First Amendment varies depending on the form in which the speech occurs. Absent special circumstances, which are not present in the instant case, the First Amendment does not provide for the right of free speech on privately owned property such as the Searstown Mall.

As Respondent argued below, Petitioners do not even make it to the policy and custom element of a § 1983 claim because Respondent is not a state actor subject to § 1983 liability. This Court discussed the "state action" pre-requisite of the Fourteenth Amendment in relation to the "under color of state law" element of § 1983 in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982) and set forth a two-part test for deciding whether conduct allegedly denying a plaintiff a federal right is "state action." *Id.* at 937. First, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person from whom the State is responsible." *Id.* Second, the party denying the right must be "a person who may fairly be said to be a state actor." *Id.* This second element may be satisfied by finding that the party is a state official, acted in concert with state officials, or

because his conduct is otherwise chargeable to the state. *Id.* Accordingly, the concepts of "state action" and "color of state law" combine when one accused of denying a federal right is one whose official character is such as to lend the weight of the state to his decision. *Id.* However, the concepts remain distinct when a private party is accused. *Id.*

The Eleventh Circuit has held that a private party rarely may be considered a "state actor" for purposes of § 1983. *Harvey v. Harvey*, 949 F. 2d 1127, 1130 (11th Cir. 1992). In determining whether a private person's or entities' actions amount to state action, the Eleventh Circuit has recognized three separate tests: 1) the public function test; 2) the state compulsion test; and 3) the nexus/joint action test. *NBC v. Communication Workers of America, AFL-CIO*, 860 F.2d 1022, 1026 (11th Cir. 1988).

A private party is deemed to be a state actor under the public function test only if it exercised powers traditionally exclusively reserved to the state. *Id.* at 1026. This has been interpreted narrowly, generally applying only to functions like holding elections and exercising eminent domain. In fact, it has been held that even where a private party has powers co-extensive with the state, there can be no state action unless private actors are given powers traditionally the exclusive prerogative of the State. *Harvey*, 949 F.2d at 1131. Few activities are reserved to the state and Petitioners have failed to cite any authority for the premise that they have a constitutional right to be free from a trespass warning.

Applying these principles to the case at hand, Respondent's conduct did not amount to state action under the public function test. The Petitioners contend that the exclusive state function that has been delegated in this case

is the control over access to the State of Florida Unemployment Benefits Office located within the Mall and/ or the security guards alleged authority to guard this governmental office. This argument fails, "because controlling access to public facilities leased by the government is simply not a function that has been traditionally exclusively reserved to the state." *See Southwest Community Resources, Inc., et. al. v. Simon Property Group, LP, et. al.*, 108 F. Supp. 2d 1239 (D.C. Mexico 2000).

Likewise, Plaintiffs' argument fails in that the Mall is not a public forum. Private property does not lose its private character merely because the public is generally invited to use it or merely because governmental offices happen to be located therein. *Southwest Community*, 108 F. Supp. 2d at 1255. It is clear that private property cannot become a public forum unless the private owner specifically intends to designate it as such. *Id.* at 1256. "Plaintiffs argument ultimately fails because the nature of the mall's invitation to the public is only to do business with the mall's tenants (including the government facilities) not to engage in any expressive activities." *Id.* Such an invitation would be insufficient to create a designated public forum." *Id.* Based on the foregoing, Petitioners cannot demonstrate state action on the part of Respondent under the public forum test merely because a government unemployment office is located within the Mall.

The evidence in the record also clearly demonstrates that Respondent is not a state actor under the nexus/joint action test because the Petitioners failed to prove that the government has "so far insinuated itself into a position of interdependence with the private party that it was a joint participant in the enterprise." *Harvey v. Harvey*, 949 F.2d at

1130. Petitioners purport to claim that this test is met because of alleged contact between Respondent and the City of Titusville in the issuance of trespass warnings. This evidence is clearly not sufficient to establish a conspiracy or joint action under the color of law. *See Mann v. Hillsborough County Sheriff's Office*, 946 F. Supp. 962, 968 (M.D. Fla. 1996) (although police presence during the entering of plaintiff's home without her presence and permission and preventing plaintiff from access to her home may constitute wrongs, it does not rise to the level of a conspiracy or joint action necessary to show color state law required under § 1983).

Likewise, the undisputed facts in the instant case do not rise to the level of state action on the part of Respondent under the nexus/joint test. In fact, Mrs. Edwards admitted in her deposition that no one from the Mall was present on the night of the incident. Further, there is no evidence to support that any one from Respondent was even aware of the situation or the issuance of the trespass warning on the evening in question. Mrs. Edwards testified that she was unaware of any facts to support her contention that the Mall knew what the security guard was doing. (R4-111-211-212). Further, the record reveals that other than mere assumptions that the police were contacted by the security guard, the Petitioners have failed to come forth with any evidence to establish contact between the Mall and the City of Titusville Police Department. (R4-112-220).

Despite the fact that the record clearly reveals that the Respondent is not a state actor, the Petitioners also failed to demonstrate a policy or custom of Respondent to discriminate on the basis of race. Respondent did not have any official policies or procedures evidencing racially discriminatory

intent on its part in the issuance of trespass warnings. Mrs. Edwards admitted during her deposition that she had no personal knowledge or information regarding Mall policies about race. (R4-112-223). Moreover, Mrs. Edwards admitted that on numerous previous occasions at the Mall, she was never subjected to any racially discriminatory policy or practice of the Mall. (R4-112-223).

Mrs. Hardy also indicated that she was unaware of any prior complaints of discrimination at the Mall. (R4-114-57). Likewise, Petitioners failed to adduce any evidence that Mr. Bankowski was a policy-making employee of Respondent. Petitioners attempt to circumvent this proof merely by conclusory statements that Mr. Bankowski was an "agent" of Respondent. Even assuming this to be true, this alone does not prove that Mr. Bankowski was a policy-making employee. Petitioners offered no evidence that Mr. Bankowski created Mall policy, rules, regulation or otherwise. Rather, Petitioners simply asserted through conclusory statements that he implemented what was perceived to be discriminatory issuance of a trespass warning.

In the same vein, Petitioners also failed to establish that Mrs. Hardy was a policy-making employee. Although admittedly she was the manager of the Mall running the day-to-day activities, Petitioners did not prove that she was the individual responsible for setting policies regarding the issuance of the trespass warnings. In fact, when questioned about rescinding it, Mrs. Hardy informed that she would have to contact her superiors regarding this policy. Without more, there were insufficient facts to preclude the entry of summary judgment.

Petitioners purport to prove a policy or custom based upon a single incident by relying upon this Court's opinion in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989). However, the Eleventh Circuit in *Gold v. City of Miami*, 151 F.3d 1346 (11th Cir. 1998) recognized the narrowness in which a single incident meets the policy or custom test:

> To establish a deliberate or conscious choice or such deliberate indifference, a plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action.

Id. at 1349. Thus, without notice of a need to train, a municipality is not liable as a matter of law for any failure to train and supervise. Based on the foregoing, Petitioners simply failed to adduce any evidence of a need to train or of any policy or custom to discriminate, and therefore the petition should be denied.

V. Certiorari Should Be Denied Because The Eleventh Circuit's Ruling Followed Well Established Precedent Regarding Free Association Claims Under § 1983

As the District Court noted and the Eleventh Circuit affirmed, there are only two forms of association which are protected under the United States Constitution: "intimate association" and "expressive association". *Cummings v. DeKalb County*, 24 F.3d 1349, 1354 (11th Cir. 1994) (citations omitted). The right of intimate association encompasses the personal relationships that attend the creation of a family. *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994). Expressive association, on the other hand,

is protected by the First Amendment where the purpose of the association is to engage in activities independently protected by the First Amendment. *Id.*

The only mention of any association in the Third Amended Complaint is in paragraph 41, which reads: "At all times relevant, all Defendants acted toward Plaintiffs because of the Defendants' association of Plaintiffs with people of color." The First Amendment does not provide a constitutional right to associate with people of color per se. Instead, the association with people of color is protected only if it falls within the definition of intimate association or expressive association. Contrary to the assertions made by Petitioners, they did not allege in their Third Amended Complaint that they had a familial relationship with the black girls or that they were associating with the black girls for any purpose independently protected by the First Amendment. Petitioners' assertion that it was unnecessary to allege that they even made contact with the black children completely defies clearly established law requiring "association" for a violation.

Petitioners attempt to rescue their free association claim by pleading association with each other still falls short of asserting a recognizable free association claim. In this regard, Petitioners state that Mr. Edwards was banished from the mall solely because of his intimate association with his wife, who voiced her opposition to discrimination; and, Respondent associated Mr. Edwards with his wife. This clearly does not satisfy the requirements of intimate association as there is simply no allegation that Petitioners were retaliated against because they chose to enter into and maintain the intimate human relationship of marriage. Moreover, there is no allegation that Petitioners were

associated with each other for purposes giving rise to expressive association protections. Accordingly, the Eleventh Circuit's ruling in affirming the dismissal of Petitioners' freedom of association claims was proper.

VI. The Eleventh Circuit's Ruling Does Not Conflict With This Court's Decisions Regarding Equal Protection Claims

In Count III of their Third Amended Complaint, Petitioners claimed race-based denial of public accommodation, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution brought under 42 U.S.C. § 1983. To determine whether a party has violated the rights afforded persons under the Equal Protection Clause of the Fourteenth Amendment, it is necessary to demonstrate intentional racial discrimination in addition to proof that the victim is being treated differently on the basis of race than those persons who are similarly situated. *Rodriguez v. Lamer*, 60 F.3d 745, 749 (11th Cir. 1995) (citations omitted). Different treatment of dissimilarly situated persons does not violate the Equal Protection Clause. *E & T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987).

Plaintiffs' Third Amended Complaint is completely devoid of any allegations alleging that they were treated differently than similarly situated individuals, i.e. white patrons who opposed racial discrimination of black patrons of the mall. In fact, the Third Amended Complaint alleged that all persons that the Mall owners requested to have trespassed were in fact trespassed by the police. As such, Petitioners failed to plead that they were treated differently than any other person who was trespassed or than any other

person who allegedly interfered with the security guards' performance of their duties. Accordingly, dismissal of Petitioners Equal Protection claim was appropriate.

CONCLUSION

Based on the foregoing facts and authorities, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

HELEN EDWARDS,
CHRISTOPHER EDWARDS,
Petitioners,

v.

ACADIA REALTY TRUST, INC.,
WELLS FARGO GUARD SERVICE, INC.
OF FLORIDA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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42 U.S.C. § 1983 . . . . . *passim*

Statement of Facts

Respondents make several erroneous or misleading statements regarding the facts of this case that should not be left unchallenged. For instance, Respondents state: "Petitioners did not observe a security guard approach the white children and admitted that the security guard may have escorted these children out of the Mall that evening, but may not have witnessed it." However, no evidence was adduced that the security guards did eject white children, even though the evidence shows that the security guards had ample reason and opportunity to do so. Moreover, the evidence is that the security guards were present when the white children were unaccompanied and violating mall policy, and that the guards did nothing at the time to remove the children. (R4-111-106:6-13, 192:2-12; R8-230-1-2; R8-231-1-2; R4-101-2; R4-102-2; R1-2-2.) Thus, because the key issue regarding the Edwardses' retaliation claims is whether or not the Edwardses had a reasonable, good faith belief that they were opposing unlawful racial discrimination, the evidence of the security guards' lack of action against the white children actually supports the Edwardses' claims.

Acadia's sequence of events is backwards because the evidence shows that Bankowski replied that he did not care and that the girls needed to get their "black asses" out of there after the Edwardses had been sitting on the bench for several minutes and after the Edwardses witnessed Bankowski's brusque interaction with the black boys. (R4-108-66:3-67:1; R4-111-44:20-46:20; R4-111-203:15-25.) Furthermore, it is the subsequent racist conduct by Bankowski with the black girls (and the lack of Bankowski's interaction with white children) that caused the Edwardses to realize that Bankowski probably had been acting rudely and brusquely towards the black boys because of race, and not for any nonracist reason as first assumed

by the Edwardses. (R4-112-167,168.) Moreover, the Edwardses witnessed the guards interact twice with the black girls, in one instance stalking the girls around a store and out into the common area of the mall insinuating that they were watching the girls because they thought the girls would steal something. (R4-111-60-62.)

Acadia also alleges that the police officers performed an investigation before issuing the trespass to Mr. Edwards. However, the evidence shows that the police spoke to the Edwardses only to warn the Edwardses to leave and not to return for two years and not to complain to the NAACP about the matter. (R4-109-135,148.) Moreover, the evidence shows that the police actually refused to conduct any investigation, telling the Edwardses that the police had to do whatever the property owner wanted them to do and ignoring the Edwardses' pleas to confirm the Edwardses' story by speaking to the black girls standing nearby. (R4-109-133-138; R4-11-84-86.)

Acadia also asserts that a trespass warning was issued to Mrs. Edwards, not Mr. Edwards. However, the record includes a copy of the "trespass after warning" citation issued to Mr. Edwards that night at the Mall (not Mrs. Edwards) (R4-109-144, Def. Ex. 2); and, the testimonial and other evidence shows that both Mrs. and Mr. Edwards were ejected from the Mall that night and banished from the Mall for two years thereafter. (R4-109-133-138.)

Wells Fargo states: "Mr. Bankowski called the Titusville Police Department and requested that a trespass warning be issued to the Edwards because they were interfering with his duties as a security guard and yelling at him." However, Mr. Bankowski admitted that he called the police to trespass the Edwardses because Mrs. Edwards would not listen to his side of the story. (R4-105-8-10.) Also, substantial evidence exists, which must be taken in the Edwardses' favor, that Mrs.

Edwards never yelled at Bankowski or anyone else in the Mall. (R4-122-36,37.) Moreover, the undisputed evidence shows that Mr. Edwards never yelled and that he spoke only once to quietly and calmly establish that Bankowski would not strike Mrs. Edwards with the club-like flashlight. (R4-108-93-102.)

Acadia states: "Mrs. Edwards testified that neither she nor her family had any other encounter with the Mall security before November 20, 1998 except on one occasion following the incident." However, the evidence shows that Mr. Edwards was concerned at the time that his dark-skinned nephew was being singled out for adverse attention because of the nephew's dark skin color. (R8-230-2,3.)

Wells Fargo states: "Dr. Perez did not have the opportunity to observe the security guards ask any other children to leave the Mall that evening." However, the important point is that the evidence shows that Dr. Perez, like the Edwardses, had ample opportunity to see white children escorted out of the Mall had the security guards done so while Dr. Perez was in the Mall, but the security guards confronted, stalked, harassed, and ejected only black children, even though the security guards had ample opportunity and reason to escort or eject white children.

Respondents assert that Bankowski escorted the black girls out of the mall because it was safer to wait outside. However, it boarders on the inane to assert that a group of children are safer waiting for their parents outside of a mall at night than they would be inside the mall where many witnesses could see if they were to be abducted or accosted. Additionally, Acadia asserts that Bankowski escorted the children out because most parents want to pick up there children outside of the mall. However, in this instance, Mr. Bankowski knew that the girls' mother wanted them to wait for her

inside the mall and he said that he didn't care. (R4-108-57.)

Acadia also asserts that "Mrs. Hardy believed that Mr. Bankowski had the legal right to exclude her from the Mall for interfering with his duties as a security officer." However, when Mr. Edwards and friends of the Edwardses tried on at least two occasions to explain to Hardy that the trespass was in retaliation for protesting racial discrimination, Hardy said she didn't care, she would support the security guard's decision, and the Edwardses would have to write a letter of apology before they would be allowed to return to the mall. (R4-112-128:9-129:10; R4-103-8:2-10,79:15-80:25, 86:21-87:5; R4-101-4, Par. 29; R4-102-4, Par. 29; R4-109-179:16-180:6.) Additionally, although Acadia points out that the trespass order was eventually rescinded, it was not rescinded while Acadia owned the mall, and it was not rescinded until after this lawsuit was filed and after Defendants failed or refused to rescind the order after at least two prior requests. (R4-100-4, Composite Exhibit 6 to Notice of Filing Evidence in Support of Motion for Summary Judgment; R4-101-4, Par. 31; R4-102-4, Par. 31.)

Acadia also asserts that the Titusville police department's practice was that a police officer has the discretion to refuse to trespass an individual if the officer believes the trespass warning has an unlawful basis. However, the evidence shows that the police officers told the Edwardses that they did not have discretion not to issue the trespass warning, saying to the Edwardses that they were required to issue a trespass warning at the proprietor's request. (R4-109-133-135.)

Within its Argument, Acadia also asserts that there is no record evidence that the Edwardses were trespassed "based upon any discriminatory motive on the part of Respondent." However, as explained further below, because this case regards a

retaliation claim, the Edwardses are not required to show that they suffered racial discrimination. Instead, they must show that they suffered retaliation for opposing racial discrimination. This evidence is present in the record with respect to the timing of Bankowski's threat to trespass the Edwardses -- immediately after Mrs. Edwards objected to Bankowski's racially discriminatory conduct. (R4-108-99=101.) Additionally, Bankowski himself admitted that he trespassed the Edwardses because Mrs. Edwards would not listen to his explanation (about why he discriminated against the black children), and that he was angered by her accusations of racism. (R4-105-8-10.) Thus, Acadia's conclusory statement that no evidence shows the discriminatory intent is not consistent with the record.

Argument and Authorities

Petitioners rely on their Petition For Writ Of Certiorari to adequately refute most of the factual and legal statements made by Respondents in their Answer briefs. However, some arguments made by Respondents cannot be allowed to go unanswered.

I. ACADIA MISINTERPRETS THE BASIS FOR THE SECTION 1981 CLAIM AND CITES TO ELEMENTS THAT ARE IRRELEVANT TO THIS CASE.

Acadia attempts to confuse this Court with citations to cases stating the elements for a claim for discrimination under 42 U.S.C. § 1981. However, this case is a claim for retaliation for opposing racial discrimination. Claims for retaliation for opposing racial discrimination have different elements than do claims for discrimination. Acadia cites to cases holding that claims for racial discrimination under 42 U.S.C. §

1981 require a showing of intentional discrimination. While these cases may be good law, they are irrelevant to the case at bar, where the Petitioners are not making claims for racial discrimination under § 1981. Rather, Petitioners' claims are for retaliation for opposing racial discrimination under 42 U.S.C. § 1981.

The real issue in this case, and the issue for which this Court should grant certiorari review, is whether a plaintiff making a § 1981 retaliation claim is required to prove the underlying discrimination, or whether, as in Section 1981 and Title VII retaliation cases in the employment context, a reasonable, good faith belief that the underlying discrimination occurred is sufficient to support the claim.[1]

Acadia also attempts to mislead this Court by citing the case of *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), for the proposition that "the mere utterance of an ethnic or racial epithet which engenders offensive feelings" does not support a claim for intentional discrimination under §1981. However, the *Henson* case actually deals with a claim for a racially hostile work environment, which usually would require more than one instance of racial hostility to prove the entire work environment was racially hostile. Additionally, again, the *Henson* case deals with racial discrimination, not retaliation.

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[1]Petitioners maintain that they submitted more than enough evidence to allow the jury to decide that the underlying discrimination did occur.

II. RESPONDENTS WERE STATE ACTORS FOR THE PURPOSES OF THE CLAIMS BROUGHT UNDER SECTION 1983; HOWEVER, IF DEFENDANTS ARE NOT STATE ACTORS, SECTION 1981 STILL APPLIES WITHOUT REFERENCE TO CUSTOM OR POLICY.

Acadia argues that it was not a state actor. However, both Respondents fail to deal with or even acknowledge that claims under § 1981 do not require proof of state action. Thus, as to the § 1981 claim, the issues of whether respondents were state actors, and, if so, whether they had a policy, custom, or practice that led to the violation of Petitioners' rights are not necessary to the claim under 42 U.S.C. §1981. Furthermore, with respect to claims made under 42 U.S.C. §1983, the issue Acadia raises as to whether it was a state actor was not an issue actually reached by the lower courts, and Petitioners did not directly raise and fully brief that issue in their Petition. Petitioners would be happy to brief this Court or to accept remand on that issue. Nevertheless, Acadia's reliance on *Mann v. Hillsborough County Sheriff's Office*, 946 F. Supp. 962 (M.D. Fla. 1996), is misplaced. In *Mann*, the deciding factors for the District Court not to find state action in that routine (non-discriminatory) landlord-tenant dispute were stated as follows:

> It must be noted that the Creasys changed the locks and took pictures inside the Mann's home without the presence or aid of the deputies. Furthermore, as they had keys to the house and the Manns were not present when they entered the house, the deputies did not effectuate the entry into the home. In addition, as

> the Creasy's changed the locks without the presence of the deputies, thus denying the Plaintiff reasonable entry, the deputies did not effectuate the wrongful eviction.

Id. at 968. Here, the City of Titusville police officers did effectuate the ejectment of the Edwardses under express threat of arrest. Furthermore, the police officers did effectuate the banishment of the Edwardses from the Mall for two years, again by express threat of arrest upon the Edwardses' premature return.

In addition, unlike the deputies in *Mann*, the City of Titusville police stated that they had to do whatever the property owner told them to do. Also, it was necessary for the City of Titusville to act in rescinding the trespass order. Moreover, the issue of the underlying racial discrimination and related retaliation that is at issue in the instant case was not the issue in *Mann*. Thus, material differences exist between the facts in *Mann* and in the instant case.

III. BOTH DEFENDANT'S ARGUMENTS THAT THIS COURT SHOULD NOT APPLY ITS ANALYSIS FROM RICHARDSON V. MCKNIGHT TO PRIVATE ENTITIES ACTING AS STATE ACTORS WITH RESPECT TO CUSTOM, POLICY, OR PRACTICE ANALYSIS UNDER SECTION 1983 SHOW WHY THIS COURT SHOULD GRANT CERTIORARI FOR THIS ISSUE.

In *Richardson v. McKnight*, 521 U.S. 399 (1997), this Court held that private entities acting in the role of state actors should not be protected by qualified immunity. For the same reasons articulated in *Richardson*, Petitioners argue that private entities acting in the role of state actors

should not be given the protection granted to local government entities regarding vicarious liability in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Acadia argues that the Eleventh Circuit and "most other circuits" agree that a private entity acting as a state actor is entitled to the vicarious liability protections granted to local governments in *Monell*. However, those cases rely on qualified immunity rationales that have been discredited by *Richardson*. Thus, this Court should grant certiorari review because the cases alluded to by Acadia are in conflict with this Court's reasoning in *Richardson*.

Conclusion

This Court should grant certiorari review to decide the issues presented in the Petition for Writ of Certiorari.

Respectfully submitted,

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